85-1962

No. 85-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAUL R. RIDDICK, JR., *et al.*,

Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF NORFOLK, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether a public school system that has been declared "unitary" only after eliminating all one-race schools through a desegregation plan conforming to Swann v. Charlotte-Mecklenburg Board of Education, 401 U.S. 1 (1971), will violate its constitutional duty to eradicate racial segregation as announced in Brown v. Board of Education, 347 U.S. 483 (1954), if it then dismantles the desegregation plan that made it "unitary" and assigns almost 40% of black elementary pupils to ten all-black schools which existed prior to the unitary plan?

II. Does the proposed plan violate the Fourteenth Amendment on this record where:

(a) It is undisputed that the plan will have a substantial segregative effect on thousands of pupils who now attend integrated schools, by placing two-thirds of white elementary pupils in 14 majority white schools and 39% of blacks in ten 97 to 100% black schools; and

(b) The school board adopted the plan to serve the explictly articulated racial purpose of increasing the number of white pupils attending the Norfolk public schools, and this is to be achieved by minimizing the number of blacks attending schools with whites by creating 14 schools having over 50% white pupils in accord

with the board's public opinion poll showing that white parents (but not black parents) opposed sending their children to schools where they were less than a majority?

LIST OF PARTIES

1. The named plaintiffs in this certified class action are listed below:

Paul R. Riddick, Jr. and Phelicia Riddick, infants by Paul R. Riddick, their father and next friend;

Cynthia C. Ferebee, Johnny Ferebee, Gary Ferebee, and Wilbert Ferebee, infants, by Rev. Luther M. Ferebee, their father and next friend;

Anita Fleming, infant, by Blanche Fleming, her mother and next friend;

Darrell McDonald and Carolyn McDonald, infants, by Ramion McDonald, Sr., their father and next friend;

Eric E. Nixon and James L. Nixon, infants, by Patricia Nixon, their mother and next friend;

Johnny Owens, Trent Owens, Myron Owens, Shawn Owens, and Antonio Owens, infants by Annette Owens, their mother and next friend;

Paul R. Riddick, Rev. Luther M. Ferebee, Blanche Fleming, Ramion McDonald, Sr., Patricia Nixon, and Annette Owens.

The district court certified a plaintiff class consisting of "all present and future black schoolchildren in the public school system of the City of Norfolk, Virginia" pursuant to Rules 23(a)(1) and 23 (a)(2) Fed. R. Civ. P.

2. The defendants are the School Board of the City of Norfolk, and the members of the school board sued in their official capacity. The individual defendants are Thomas G. Johnson, Jr., Dr. John H. Foster, Dr. Lucy R. Wilson, Jean C. Bruce, Cynthia A. Heide, Robert L. Hicks, and Hortense R. Wells. Mr. G. Wesley Hardy replaced Dr. Foster on the Board.

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No. 85- ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAUL R. RIDDICK, JR. et al,

Petitioners,

v.

THE SCHOOL BOARD OF THE
CITY OF NORFOLK, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

==========

The petitioners Paul R. Riddick, Jr. et al. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Fourth Circuit, entered in the above-entitled proceeding on February 6, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 784 F.2d 521, and is reprinted in the appendix hereto, p. 1A, infra.

The Memorandum Opinion of the United States District Court for the Eastern District of Virginia (MacKENZIE, C.J.), dated July 9, 1984 is reported at 627 F.Supp. 814 (E.D. Va. 1984). See appendix p. 99A, infra.

JURISDICTION

Petitioners brought suit in the Eastern District of Virginia invoking federal jurisdiction under 42 U.S.C. sections 1981, 1983 and 1988, and under 28 U.S.C. sections 1331, 1343(3) and 1343(4).

On July 9, 1984, after a trial on the merits, the Court denied petitioners' prayer for injunctive relief.

On petitioners' appeal, the Fourth Circuit on February 6, 1986 entered a judgment and opinion affirming the District Court. A timely petition for rehearing and suggestion for rehearing en banc was denied March 19, 1986. App. 158A, infra.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. section 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Introduction

This class action was filed in May 1983 by a group of black parents seeking an injunction to prevent the Norfolk School Board from dismantling a desegregation plan for elementary pupils and changing ten currently integrated schools into one-race schools which will range from 97 to 100% black and average 99% black. Both courts below have approved the proposed plan, which would assign 39 percent of Norfolk's black elementary students to the ten all-black schools.[1] The same ten schools were all-black in 1969 prior to the final desegregation plan ordered by the courts in a prior case in

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[1] About 59% of the pupils are black. It was estimated that 4738 black and 54 white children would attend the 10 black schools. The remaining 26 elementary schools would have 8403 white and 7416 black pupils.

1971. Thus, after 15 years of desegregation, Norfolk's schools will again become substantially segregated unless this Court intervenes.

In a historic prior lawsuit which lasted 19 years black parents successfully overcame Virginia's official policy of "massive resistance" and desegregated the public schools of Norfolk, Virginia.[2] That

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[2] Opinions in the earlier case and related cases were:

1. Beckett v. School Board of City of Norfolk, 148 F.Supp. 430 (E.D. Va.), affirmed 246 F.2d 325 (4th Cir.) cert. den. 355 U.S. 855 (1957).
2. Beckett v. School Board of the City of Norfolk, 2 Race Relations Law Reporter 337 (Feb. 12, 1957).
3. Beckett v. School Board of the City of Norfolk, 3 Race Relations Law Reporter 942-964 (1958).
4. Beckett v. School Board of the City of Norfolk, 3 Race Relations Law Reporter 1155 (E.D. Va. 1958); affirmed 260 F.2d 18 (4th Cir. 1958).
5. James v. Almond, 170 F.Supp. 331 (E.D.Va. 1959); 3-Judge Court.
6. Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959).
7. James v. Duckworth, 170 F.Supp. 342 (E.D. Va. 1959); affirmed 267 F.2d 224 (4th Cir. 1959).

litigation required ten appeals to the

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8. Beckett v. School Board of the City of Norfolk, 181 F.Supp. 870 (E.D. Va. 1959). Beckett v. School Board of the City of Norfolk, 5 Race Rel. L. Rep. 407 (Oct.23, 1959).

9. Beckett v. School Board of the City of Norfolk, 185 F.Supp. 459 (1959); affirmed sub. nom. Farley v. Turner, 281 F.2d 131 (4th Cir. 1960).

10. Hill v. School Board of City of Norfolk, 282 F.2d 473 (4th Cir. 1960).

11. Beckett v. School Board of the City of Norfolk, 9 Race Relations Law Reporter 1315 (E.D.Va. 1964); vacated and remanded sub. nom. Brewer v. School Board of the City of Norfolk, 349 F.2d 414 (4th Cir. 1965).

12. Beckett v. School Board of the City of Norfolk, 11 Race Relations Law Reporter 218 (E.D. Va. 1965).

13. Beckett v. School Board of the City of Norfolk, 11 Race Relations Law Reporter 1273 (E.D. Va. 1966).

14. Beckett v. School Board of the City of Norfolk, 269 F.Supp. 118 (E.D. Va. 1967); supplemental memorandum 12 Race Rel. L. Rep. 867 (June 2, 1967).

15. Brewer v. School Board of the City of Norfolk, 397 F.2d 37 (4th Cir. 1968) en banc.

16. Beckett v. School Board of the City of Norfolk, 302 F.Supp. 18 (E.D.Va. 1969).

17. Beckett v. School Board of the City of Norfolk, 308 F.Supp. 1274 (E.D. Va. 1969); reversed and remanded sub. nom. Brewer v. School Board of the City of Norfolk, 434 F.2d 408 (4th Cir.

Fourth Circuit before it finally produced an acceptable desegregation plan.[3] The case was concluded on February 14, 1975, four years after implementation of a desegregation plan which used the techniques of rezoning, pairing and busing approved in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), when counsel agreed to the following order:

> It appearing to the Court that all issues in this action have been disposed of, that the School Board of the City of Norfolk has satisfied its affirmative duty to desegregate, that

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1970) en banc; cert. den. 399 U.S. 929 (1970).

18. Brewer, sub nom. Adams v. School Dist. No. 5, Orangeburg Co. S.C., 444 F.2d 99 (4th Cir.) en banc; cert. den. 404 U.S. 912 (1971).

19. Brewer v. School Board of City of Norfolk, 456 F.2d 943 (4th Cir.), cert. den. 406 U.S. 933 (1972).

20. Brewer v. School Board of City of Norfolk, 500 F.2d 1129 (4th Cir. 1974) (attorneys fees).

[3] An eleventh appeal involved attorneys fees. See note 1 supra.

racial discrimination through official action has been eliminated from the system, and that the Norfolk School System is now "unitary", the Court doth accordingly

ORDER AND DECREE that this action is hereby dismissed, with leave to any party to reinstate this action for good cause shown.

The Beckett/Brewer Case, 1956-1975.

The Norfolk school desegregation case began in 1956 amidst Virginia's official policy of "massive resistance" to Brown v. Board of Education, 347 U.S. 483 (1954). An injunction was issued and affirmed on appeal in 1957, but no desegregation occurred during the first four years after Brown I. Beckett, supra, 246 F.2d 325. In the fall of 1958, when the District Court finally ordered the admission of 17 black children to several Norfolk schools (while denying the similar requests of 134 others), Virginia's Governor issued a proclamation closing the schools. Bec-

kett, supra, 260 F.2d 18; James v. Almond, supra, 170 F.Supp. 331. After state and federal courts simultaneously ruled the school closing unconstitutional (James, supra, Harrison v. Day, supra), Norfolk's City Council was enjoined to prevent the enforcement of resolutions cutting off funds to the integrated schools. Duckworth v. James, supra, 267 F.2d 224.

Even after the first handful of black children were admitted to white schools, the court found "the melody of massive resistance lingers on" (185 F.Supp. at 462), as black pupils ran a gauntlet set up by the state's "pupil placement board" laws and procedures. Farley v. Turner, supra, 281 F.2d 131. Progress was slow. By 1964, 1251 of 13,348 black children elected to transfer to white schools while the all-black schools remained intact. Beckett, supra, 9 Race Rel. Law Rep. 1315.

Plaintiffs' attempts to obtain system-wide desegregation and faculty desegregation were initially rejected. Brewer, supra, 349 F.2d 414. In 1964 the board adopted neighborhood attendance areas, and in some districts allowed pupils an option to attend either a black or a white school. The neighborhood plan was amended repeatedly as litigation continued during 1965-1968. See note 2 supra; Brewer, supra, 397 F.2d 37.

In 1969 the board proposed, and the district court approved, implementation of a so-called "optimal plan of desegregation" which was an effort to create "middle class" schools. Beckett, supra 308 F.Supp. 1274. The premise of the plan was that 30% Negro schools would be "optimal", and the board drew "neighborhood" school zones to achieve this result in a few schools. The Fourth Circuit

rejected the plan in 1970 because the "optimal" neighborhood zones left 76% of the black elementary pupils attending 19 all-black schools. Brewer, supra, 434 F.2d 408. In 1970 the Fourth Circuit finally ordered system-wide faculty desegregation. Id.

In June 1971, following this Court's decisions in Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1 (1971), and Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33 (1971), the Fourth Circuit ordered the district court to require a plan based on the proposal of the Government's expert witness, the "Stolee C plan". See Adams, supra, 444 F.2d 99. The Fourth Circuit ordered "all techniques of desegregation, including pairing or grouping of schools, noncontiguous attendance zones, restructuring of grade levels, and the trans-

portation of pupils." Id. at 101. The district court ordered such a plan implemented in 1971, but refused to require free transportation to pupils assigned to schools beyond walking distance. On a tenth appeal to the Fourth Circuit plaintiffs won an order requiring free bus transportation on the ground that the "Court cannot compel the student to attend a distant school and then fail to provide him with the means to reach that school." Brewer, supra, 456 F.2d at 947.

The school board filed annual reports about its implementation of the plan in 1972, 1973, and 1974. After receiving the third such report, the district court entered the order of February 14, 1975 quoted above. Counsel for plaintiffs and defendants had consented to this order. The case was thus concluded without any further evidence, or any notice to members

of the plaintiff class. The order did not dissolve or modify the court's previous injunction.

The system of segregation prior to the 1971 Plan.

Under Norfolk's 1969 desegregation plan, one high school, five junior highs, and 22 elementary schools were more than 90% black. Brewer, supra 434 F.2d at 410; PX 144. Each of the 22 segregated black elementary schools was established as part of the system of de jure segregation. Sixteen of the 22 schools were 100% black. PX 144. Eleven of these 22 schools are still operated as elementary schools in Norfolk, eleven others were closed between 1972 and 1980.[4]

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[4] The 93-100% black elementary schools in 1969 which are still open are Bowling Park, Tidewater Park, Young Park, St. Helena, Chesterfield, Monroe, Roberts Park, Tucker, Diggs Park, Lindenwood and Oakwood. In addition a one-race black Junior High School in 1969 is now

Plaintiffs' attack on the board's present proposed plan, which is discussed below, focuses on ten schools which were all black in 1969. Nine of these schools are located near all black public housing projects. All of the schools and most of the nearby housing projects were built during the period of de jure school and housing segregation. (PX.163,164,165, 164F).

School Opened	Project Opened
Chesterfield (1920)	Grandy Park (1953)
Tucker (1942)	Oakleaf Park (1942) & Diggs Park (1952)
Bowling Park (1953)	Bowling Park (1952)
Diggs Park (1953)	Diggs Park (1952)
Young Park (1954)	Young Park (1953)
Roberts Park (1964)	Roberts Park (1942)
Tidewater Park (1964)	Tidewater Park (1955)
Jacox (1949)	Roberts Park (1942) & Roberts East (1953) & Moton Park (1962).

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operated as the Jacox Elementary school. The 98-100% black elementary schools closed between 1972 and 1980 were Carey, Gatewood, Goode, Liberty Park, Lincoln, Smallwood, Titus, Titustown, West, Lee, and Marshall.

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Monroe (1903)	subsidized sec.8 housing
St. Helena (1966)	Bell Diamond Manor (1970's) (Subsidized, § 236)

The 1971 Desegregation Plan.

The 1971 plan eliminated all of Norfolk's one-race schools. From 1971 to the 1984 trial (and indeed to the present time), Norfolk has not operated any school which was all black or white. PX 152. The desegregation plan for elementary schools relied on the pairing and grouping technique. Pupils were transported both within single attendance areas, and between paired noncontiguous areas. The school authorities modified the plan to create single zone attendance areas when integrated residential areas developed. When the board made changes to the plan such as school closings it sought to place

a maximum of 70% of any race in a school, but the board did not make annual adjustments to maintain racial balance.

In 1983[5] Norfolk's elementary schools were well desegregated with enrollments ranging from a high of 80.7% black at Bowling Park to 23.7% black at Sewell Point. All but seven elementary schools were reasonably close (within plus or minus 15 percentage points) to the elementary average of 57% black students.

At the time of the trial (1983-84 school year) pupils in 12 elementary schools were assigned in single attendance areas surrounding the schools; the other 28 elementary schools were grouped and paired in a pattern similar to the 1971

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[5] 1983-84 figures are the most recent ones in the record. The Fourth Circuit order denying rehearing also denied plaintiff's motion to supplement the record to add 1984-85 and 1985-86 enrollment statistics. App.162A.

plan. Agreed Ex.17(a). The plan remained in effect during the appeal of this case through the 1985-86 school year. After the Fourth Circuit decision the board resolved to implement its proposed new plan in the fall of 1986.

The Proposed Plan

The school board adopted the Proposed Plan February 2, 1983 by a 5-2 vote with 2 of its 3 black members dissenting. The plan would create a contiguous single attendance area for each elementary school and break up the pairs and clusters which were the basis for the 1971 plan. The new zones did not reflect historic or functional Norfolk neighborhoods and the trial court found that the term "neighborhood schools" was being used "somewhat inaccurately". 627 F.Supp. at 817. The board estimated the expected racial percentages in each school based on initial assign-

ments. The trial judge credited estimates that 10-15% of black pupils, but very few whites, would elect majority-to-minority-race transfers by which students could transfer from schools enrolling over 70% of their race to schools where their race was under 50%.

The board estimated that ten schools will become all-black if the plan is implemented. The ten schools with their racial percentages in 1969, in 1983, and under the proposed plan (PX. 144, 147--before transfers) are:

ELEMENTARY SCHOOLS	1969 BLACK%	1983 BLACK%	PROPOSED BLACK%
Bowling Park	100.0%	80.7%	100.0%
Tidewater Park	100.0%	68.8%	100.0%
Young Park	100.0%	57.1%	100.0%
St.Helena	98.9%	57.7%	99.1%
Chesterfield	92.9%	69.9%	99.1%
Monroe	98.9%	63.3%	99.0%
Roberts Park	100.0%	76.6%	98.0%
Jacox (all black jr.hi)		65.0%	98.0%
Tucker	100.0%	47.2%	98.0%
Diggs Park	100.0%	66.7%	96.9%

It was estimated that 4738 black and 54 white children would attend these 10 schools. The other 26 elementary schools would have 8403 white and 7416 black pupils. The reciprocal effect of this realignment would create 14[6] majority white schools. (Id.):

ELEMENTARY SCHOOLS	1969 BLACK %	1983 BLACK %	PROPOSED BLACK %
Fairlawn	1.9%	64.2%	49.9%
Coleman Place	0.0%	57.2%	44.5%
Calcott	0.0%	61.8%	40.1%
Meadowbrook	6.8%	47.8%	40.0%
Taylor	0.0%	36.4%	39.9%
Willoughby	4.6%	24.3%	36.1%
Camp Allen (opened 1970)		61.1%	36.0%
Sewell Pt	31.3%	23.7%	34.1%
Sherwood Forest	0.0%	49.1%	30.1%
Oceanair	4.1%	45.8%	29.0%
LittleCreek	.2%	57.0%	28.0%
Tarrallton	2.2%	60.9%	22.0%
Ocean View	7.5%	56.8%	17.2%
Bay View	0.0%	44.6%	15.1%

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[6] The 14 schools would enroll 5423 whites (64% of white elementary pupils) and 2587 blacks and average 67.7% white.

Only about 13 of the 36 schools would remain reasonably close to the projected 59% black district average. Thirty-nine percent of black elementary students would attend the 10 all-black schools and two-thirds of white pupils would attend the 14 majority white schools. Only two of the 22 black elementary schools which existed in 1969 would be integrated; the others are either closed or scheduled for resegregation. The chart at the end of this petition (page 1B) contains the enrollments for each elementary school in 1969, 1983 and under the proposed plan.

White Flight

The District Judge found that "the primary objective of the Board in adopting the Proposed Plan" was "providing a response to the threat posed by white flight to the long term integration of the Norfolk school system...." 627 F.Supp. at

824. In agreement with the Board's contention, the Court found that "as a result of busing, the Norfolk school system has lost between 6000 and 8000 white students who otherwise would have enrolled there"; and that "as a result of white flight, the Norfolk schools are faced with imminent resegregation." 627 F.Supp. at 822. The court said that "one of the purposes of the Proposed Plan is to stabilize elementary school population at its present ratio of black students and white students, roughly 60-40." Id. at 821. The judge found "the possibility that the Proposed Plan would increase the number of white students would be a strong point in its favor." Id. at 822.

Before adopting the plan the board employed a consultant, a sociologist, Dr. David Armor who recommended that the board proceed with the plan in a report dated

December 1982.[7] Dr. Armor's report concluded that white enrollment "declined at an alarming rate during the 1970's" because of mandatory busing policies (4th Cir. App. 2164); that "racial balance has little value if all schools are predominantly black" (Id.); and that "there is no indication from Norfolk achievement test results that racial balance has aided the academic progress of its minority students; on the contrary, it is quite possible that some damage was done during the mid-seventies." Id. at 2164-65. He predicted that if busing continued white enrollment would "drop to about 8,000 students in 1987" (id. at 2166) and then

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[7] The Armor report is Agreed Ex.43. The board approved the plan after it received Dr. Armor's report, and expressly relied on his predictions about the return of whites to the system, predicting an increase of 500 white pupils the first year of the plan. See Agreed Ex.1D, note *.

Norfolk would be "nearly 75 percent minority and resegregated according to most definitions of segregation."[8] Id. The report predicted that "If a neighborhood school plan is reinstated and white enrollment stabilizes and increases to 17,000 or so over the next five years, then voluntary methods could meaningfully desegregate up to 10,000 black students --including all of those black parents who would prefer to attend desegregated schools rather than their neighborhood schools." Id. at 2168.

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[8] Petitioners have continually contested Dr. Armor's white flight predictions and his predictions have not come true. More than 14,000 whites and "other" races remained in the system each year from 1981 to 1985. The Fourth Circuit declined to consider enrollment figures for 1984 and 1985 showing that the black-white ratio remained stable at about 1984 59-41 percent black/white from 1981 through the fall of 1985. The board opposed the motion to supplement the record in the district and appellate courts without challenging the accuracy of these facts.

Dr. Armor's predictions that the proposed plan would increase the number of white pupils in the school system rest on a public opinion poll he conducted for the board. Dr. Armor polled groups of black and white public school parents, white pre-school parents, and white private school parents on attitudes about the racial composition of schools and said:

> We find that virtually none of the groups object to sending their child to a school that is half white and half black. Interestingly, while black parents do not object to being a minority, from 40 to 56 percent of white parents do object to a school where most of the students are black. Id. at 2147-2149.

He found "three-fourths of black parents favor busing to achieve racial balance, while two-thirds of white public parents oppose it", and that white opposition was even stronger among the

pre-school and private school parents.[9] Parents were also polled about their intentions if busing was ended, leading Dr. Armor to state that "An end to busing alone would probably capture nearly all public school white parents, would nearly double the participation rate for pre-school parents, and would capture about one-fourth of private school parents..." Id. at 2158. He concluded:

> White parents oppose busing rather strongly, even those who participate in the current busing program. Only a small fraction of parents who are not now using Norfolk schools will do so if busing continues, but if it ends, it appears that significant fractions of non-users would enroll their children in Norfolk public schools. An end to busing could therefore lead to an

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[9] Although Dr. Armor's report does not mention it, his poll data actually showed that a majority of all Norfolk parents favored the present desegregation plan, when his results are weighted appropriately for the fact that the district is majority black. 4th Cir. App. 823.

> increase in white enrollment, and to long-term stabilization of white enrollment. Id. at 2163.

The District Court Decision

The district court opinion and order of July 9, 1984 upheld the Proposed Plan and denied injunctive relief to plaintiffs. The Court reaffirmed the recitals in the order of February 14, 1975 dismissing the Beckett/Brewer case and held that "the Norfolk school system displays today, as it did in 1975, all indicia of 'unitariness.'" 627 F. Supp. at 819. Supporting its conclusion, the court said that the school administration was racially balanced, that the faculty and staff is mixed and that "the overwhelming majority of schoolchildren, of both races, ... attend schools whose student bodies

are mixed." Id. The Court said that the system was "free of discrimination" in 1975 and remains so today. Id. at 820.

The court decided that the effect of the 1975 order was "to shift the burden of proof from the defendant School Board to the plaintiffs, who must now show that the 1983 Proposed Plan results from an intent on the part of the School Board to discriminate on the basis of race." Id. Citing Keyes v. School District No. 1, 413 U.S. 189 (1973), the court defined a dual system as "one which is created by state authorities acting intentionally, with discriminatory purpose, to segregate the races." The court said cases such as Green v. County School Board, 391 U.S. 430 (1968), and Swann, supra, which impose an affirmative duty on dual school systems to eliminate segregation, were inapplicable since Norfolk had "fully discharged its

affirmative obligation to create a unitary system". Id. It held that plaintiffs must prove an intent to discriminate and that such intent "will not be inferred solely from the disproportionate impact of a particular measure upon one race." Id. It rejected plaintiffs' arguments that Swann required the board to justify one-race schools, saying "Swann is inapplicable here". Id. at 821.

The court found that the board's purpose to use the new plan to attract white students to the system and prevent white flight was appropriate and indeed a "strong point in its favor". Id. at 822. The court acknowledged that under United States v. Scotland Neck Board of Education, 407 U.S. 484 (1972), white flight will not excuse a failure to desegregate a dual system, but found that case also distinguishable because Norfolk "was

declared unitary in 1975 and the Board's continuing, affirmative duty to desegregate was discharged at that time." Id. at 824.

The court rejected plaintiffs' argument that another Board objective in adopting the plan, e.g., to increase the level of parental involvement in the schools, was pretextual, and also rejected an argument based on the fact that an alternative board plan (Plan II) could have reduced busing while preserving integration. Id. at 824-25. The court found Plan II "not viable" solely because of the lack of vocal support in community meetings; it made no finding that the plan was infeasible or unreasonable. Id. at 825.

The court found that Norfolk's 15 public housing projects and 7 subsidized housing projects are occupied almost

exclusively by blacks and house about 25% of Norfolk's black children. Id. at 826. Noting that the projects were built to eradicate slums and provide livable housing for low-income residents, the court said it "defies logic" to suggest that this makes the School Board responsible "in some way for the fact that under the Proposed Plan, the racially identifiable black schools are located in close proximity to those projects." Id. at 826.

The Court of Appeals Decision

The Fourth Circuit affirmed the finding that the district was now unitary as not clearly erroneous, and agreed with the district court that this shifted the burden of proof to plaintiffs. The Court acknowledged that, under Swann, school boards have the burden of showing that any one-race schools are "genuinely nondiscriminatory and not vestiges of past

segregation." 784 F.2d at 535. However, the court declined to apply the rule of Swann to Norfolk, holding instead that:

> "Once a constitutional violation has been remedied, any further judicial action regarding student assignments without a new showing of discriminatory intent would amount to the setting of racial quotas, which have been consistently condemned by the Court in the context of school integration absent a need to remedy an unlawful condition. 784 F.2d at 538.

Judge Widener's opinion for the panel acknowledged that it could "find no case decided in the same situation as that before us", (789 F.2d at 537) and then rested on reasoning in a Ninth Circuit decision, Spangler v. Pasadena, 611 F.2d 1239 (9th Cir. 1979). The Fourth Circuit expressly declined to apply the principles of five of this Court's major school decisions, Columbus Board of Education v. Penick, 443 U.S. 449 (1979); Dayton Board

of Education v. Brinkman, 443 U.S. 526 (1979) (Dayton II); Keyes, supra; Swann, supra; and Green, supra. The court said "all of those cases involved state sanctioned discriminating school districts that had not dismantled their dual systems." 784 F.2d at 539. "None had reached the goal of a unitary system as Norfolk has done." Id.

The court approved the trial court's reasoning on the question of white flight, finding Scotland Neck, supra, and Monroe v. Board of Commissioners, 391 U.S. 450 (1968), inapplicable because "Norfolk is not operating a dual school system with a present duty to desegregate." 784 F.2d at 539. The court held the board's consideration of white flight and its effort to "stabilize school integration in Norfolk" were "legitimate". Id. at 540. The court also generally approved the district

court's findings and reasoning on the other issues. The court endorsed the proposed plan as "a reasonable attempt by the school board to keep as many white students in public education as possible and so achieve a stably integrated school system." Id. at 543. It found the plan's "creating several black schools is disquieting" but said that "that fact alone is not sufficient to prove discriminatory intent." Id. at 543.

REASONS FOR GRANTING THE WRIT

I.

THE CASE PRESENTS QUESTIONS OF OBVIOUS NATIONAL IMPORTANCE WHICH ARE BOUND TO ARISE IN EVERY PAST, PRESENT OR FUTURE SCHOOL DESEGREGATION CASE.

This is a case of enormous and sweeping impact. The rule of law announced by the courts below, would -- if followed

generally -- permit a very general resegregation of the public schools of the South.

During the 32 years since Brown v. Board of Education, supra, the federal courts have devoted countless hours to deciding hundreds of school desegregation cases. These decisions have eventually produced a measure of integration in the public schools of the South. Progress toward eradicating segregation -- typified in many respects by Norfolk's experience -- is directly traceable to this Court's repeated rulings implementing Brown -- rulings which hold that school boards have an affirmative duty to desegregate, that the courts must demand desegregation plans that "work", that desegregation must not yield to public opposition, that the need for remedial criteria sufficiently specific to insure compliance justifies a

legal presumption against one-race schools, and that racially "neutral" assignment plans such as "neighborhood" attendance zones are inadequate if they fail to counteract the continuing effects of past school segregation. These are the principles of Green, Swann, and Davis, supra, which the Court reiterated and applied in such cases as Monroe, Scotland Neck, Dayton II, and Columbus, supra. It is these principles that the courts below have declined to apply to Norfolk's proposed plan. They have thus written a charter for the resegregation of the public schools of the South.

There can be no doubt that the proposed plan could not pass muster as a desegregation plan under Green, Swann and Davis. If those decisions apply, the invalidity of the proposed plan is obvious and not seriously debatable. It is only

by declaring that the entire series of precedents which are the bedrock of school desegregation throughout the nation are "inapplicable" that the courts below could approve Norfolk's proposed plan.

This treatment of Swann and cognate cases presents an issue of first impression which is bound to arise in every school case. At some point there must come a time in every desegregation suit when the school district is "unitary" in the sense that it will have carried out all of the judicial orders required by Swann and achieved at least the momentary termination of a dual system. Under the reasoning of the courts below, the arrival of that inevitable moment entitles each school district immediately to dismantle its desegregation plan, ignore the principles of Swann, and adopt a new assignment plan with substantial resegre-

gative impact, provided only that this is accomplished without revealing a purpose to "discriminate" against black pupils.

The significance of such a rule is manifest. It provides an easy and obvious way to nullify school desegregation decrees, threatening as a practical matter to undermine school desegregation plans everywhere. No principle of school desegregation law established since Brown is valid more than transitorily if the Riddick ruling stands. Every desegregation plan adopted since Brown may be uprooted, and we will face another generation of litigation over long-closed school cases.

Promptly after the Fourth Circuit decision, the U.S. Department of Justice, supporting the decision below, issued a press release listing 117 school districts that have been declared unitary and 47

districts whose orders have been "dismissed". Department of Justice Press Release dated February 18, 1986. The Department, which has continued to oppose the use of busing and other Swann remedies, issued the release in an effort to encourage districts to emulate Norfolk. Oklahoma City did so even before the Fourth Circuit ruled, and actually resegregated some of its schools in the fall of 1985. That case is now pending after argument in the Tenth Circuit. Dowell v. Board of Education of Oklahoma City Public Schools, 606 F.Supp. 1548 (W.D. Okla. 1985), pending on appeal as 10th Cir. No. 85-1886, argued March 20, 1986.

The rule announced below also foments wasteful litigation in school districts which have not yet been declared unitary. If the Fourth Circuit rule stands,

plaintiffs' lawyers have an overwhelming incentive to resist the closure of all school cases, and any acknowledgement that a district is "unitary", as long as possible, for they will know full well that all desegregation is potentially lost as soon as a district is declared "unitary". The plaintiffs' lawyers who consented to the 1975 termination of the Norfolk school case could then act on the reasonable premise that achieving present compliance through a permanent injunction was a good enough reason to end a 19-year old case. They could reasonably leave future problems to be settled when and if they arose, rather than anticipating the prompt reversal of the plan that had produced compliance. The Fourth Circuit's Riddick doctrine would make such a decision irresponsible in any future case, because a lawyer would know that an

agreement that a system was unitary was tantamount to an agreement that it could be resegregated forthwith.

The importance of the case to the next generation of black students in Norfolk is also evident. The new plan is particularly destructive in the way it concentrates school segregation among low-income blacks who reside in all-black public housing projects. Almost forty percent of Norfolk's black elementary students will be segregated during the formative kindergarten through sixth grade years. If the plan is implemented, the board will have substantially reconstituted the situation which existed during the 1960's when integration was available only for the few blacks who took the initiative of transferring out of black schools. Monroe v. Board of Commissioners, 391 U.S. 450 (1968).

II.

THE DECISIONS BELOW ARE INCONSISTENT WITH THE PRINCIPLES OF SWANN v. BOARD OF EDUCATION AND OTHER DECISIONS BY THIS COURT.

We submit that the courts below erred in declining to apply the principles of Swann when judging the validity of Norfolk's Proposed Plan. The courts did not apply Swann's presumption against one-race schools which was announced in the unanimous opinion for the Court by the Chief Justice:

> No per se rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. 402 U.S. at 26.

The courts below also declined to require the school board to show that the ten proposed one-race schools did not result from past discrimination as required in the next passage in Swann:

> Where the school authority's proposed plan for conversion from a dual to a unitary school system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part. 402 U.S. at 26.

The courts below similarly failed to judge the "adequacy" of the proposed single-attendance-zone plan in accord with Swann's admonition that:

> "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or

> distortion of school size in order to achieve or maintain an artificial racial separation. 402 U.S at 28.

A proper application of these principles would surely condemn the plan because it is undisputed that the same ten schools which Norfolk now proposes to operate as one-race schools were previously operated as one-race all-black schools as part of the de jure system of segregation. The size and location of all ten schools were determined during the dual system. All ten schools were built and planned to serve the black children who lived nearby. Norfolk followed the "classic pattern of building schools specifically intended for Negro or white students." Swann, supra, 402 U.S. at 21. The schools are still located in the same all-black neighborhoods near the same all-black public housing projects that

existed under the dual system. The ghetto areas which existed in 1960 and 1970 remain all-black today. The proposed racial composition of these schools is the obvious result of past discriminatory action on the part of the school authorities, because the proposed plan substantially reconstitutes the segregated neighborhood school plan of 1969 in those school areas. The plan reestablishes the pattern of de jure segregation in the same place and by the same method that existed previously. The school board could not possibly show "that its past segregative acts did not create or contribute to the current [proposed] segregated condition." Keyes, supra, 413 U.S. at 211.

The racial composition of these schools is plainly the "result of past discriminatory action" by school officials. The conditions which made a

neighborhood assignment plan inadequate and unacceptable in 1971 still exist: namely all-black ghettos adjacent to schools built expressly to serve those ghettos. Thus the reason for the Swann rule still exists. The fact that the board temporarily obeyed the prior injunction is not a sound basis for applying a different rule of law to the same facts which called for constitutional relief when the courts did apply Swann to Norfolk. Under Swann and Davis, none of the proposed plan's purposes -- preventing white flight, increasing parental involvement, promoting neighborhood schools -- would justify extensive segregation which could be readily avoided by available plans of integration.

The courts below held that the Swann inquiry whether pupil assignments are "genuinely nondiscriminatory" or are "the

result of present or past discriminatory action on [the State's] ... part" is inappropriate and inapplicable because the district has been "unitary" since 1975. But nothing in the 1975 order did, or could appropriately, confer on the board permission to undo the very steps that made the system unitary. The Courts below held that the system is presently unitary because all the schools are now desegregated. But there is no logic to the notion that a school system which becomes "unitary" by eliminating segregation remains "unitary" in perpetuity even if it deliberately destroys the conditions that made it unitary and reestablishes the pattern of segregation that preceded its "unitariness".

A school system that attains "unitariness" by effectuating a court-ordered plan for integrating its schools is like a

heart patient who attains "health" by having a pacemaker implanted. Just as a patient who is healthy by virtue of a pacemaker becomes sick when it is removed, a school system that is "unitary" because of an affirmative desegregation plan employing special means of insuring integration will become "dual" again when it deliberately reconstitutes a substantial number of its one-race schools by revoking the plan.

The opinions below assert that the school board acquired a new legal status when it "discharged" its affirmative duty to desegregate. But there is no reason in a doctrine that a school board's temporary obedience to a permanent injunction gives it a legal right to reestablish the exact situation that the injunction was designed to bring to an end. If the facts surrounding the Norfolk schools had origin-

ally permitted the board to dismantle its dual system simply by abandoning illegal action and acting without discriminatory intent in a "color blind" fashion, there might be logic to the lower courts' approach. But, the history of efforts to integrate Norfolk's schools plainly demonstrates that the affirmative constitutional duty to eradicate segregation could not be "discharged" by "color blind" passivity. "Discharging" the affirmative duty required pairing and non-contiguous zones designed to produce actual integration in the context of the all-black schools built to serve segregated neighborhoods and one-race public housing projects. The proposed plan to abolish the pairing and to reestablish segregation on the basis of the same neighborhood pattern violates the same constitutional duty that was temporarily fulfilled.

The reasoning of the Court below is at war with Swann's stated objective which is "to dismantle the dual system". 402 U.S. at 28. In Dayton Board of Education v. Brinkman, 433 U.S. 406, 414 (1977) (Dayton I), this Court directly held that the rescission of a desegregation plan which a board had a constitutional duty to adopt would violate the Constitution. See Dayton II, supra, 443 U.S. at 531, n.5. And in Columbus Board of Education v. Penick, 443 U.S. 449, 459 (1979), the Court announced a corollary rule that "Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." It is logical that a deliberate and intentional plan to destroy the essential features of a remedial scheme that made desegregation work and to recreate the preexisting conditions is

equally a violation of the Fourteenth Amendment. As stated in Dayton II, supra, the "Board has had an affirmative responsibility to see that pupil assignment policies and school construction and abandonment practices 'are not used and do not serve to perpetuate or re-establish the dual school system.'" 443 U.S. at 538, quoting Swann, supra.

The rule announced below would, as a practical matter, repudiate Swann, Green, Davis, Columbus and Dayton. Such a rule deserves plenary review by this Court because the practical repudiation of a series of the Court's most important constitutional decisions is as important as the decisions themselves.

III.

THE DECISIONS BELOW CONFLICT WITH THE PRINCIPLES OF THIS COURT'S KEYES, DAYTON, AND COLUMBUS DECISIONS DEFINING UNCONSTITUTIONAL SEGREGATIVE ACTIONS, AND WITH SCOTLAND NECK AND OTHER CASES REJECTING "WHITE FLIGHT" AND OPPOSITION TO DESEGREGATION AS A JUSTIFICATION FOR SEGREGATION.

Both courts below acknowledged the substantial segregative effect of the proposed plan but found that "the discriminatory impact alone shown here is not sufficient to make out such a claim" of "intent to discriminate". 784 F.2d at 543. Both courts understood that the primary purpose of the plan was to attract white students to the Norfolk public schools and thereby counteract "white flight", but found this acceptable. We believe that both holdings are inconsistent with this Court's decisions.

Petitioners submit that the segregative impact of the proposed Norfolk plan is so stark as to put the case in the class of extreme cases like Yick Wo v. Hopkins, 118 U.S. 356 (1886), and Gomillion v. Lightfoot, 364 U.S. 339 (1960) where impact alone reveals a purpose to segregate. See Arlington Heights v. Metro. Housing Corp., 429 U.S. 252, 266 (1977). The historical background of de jure segregation in the very same schools the proposed plan will segregate makes the inference of segregative purpose inescapable. Arlington Heights, supra, 429 U.S. at 267. But petitioners need not rely on impact and history alone because the racial purpose in this case was not at all covert.

The racial character of the board's primary goal in implementing the plan is quite openly acknowledged. The board

adopted the plan in reliance upon its consultant's advice that white parents opposed schools with black majorities, and that the way to stem white flight and increase the white school population was to end busing (which whites opposed) and create schools with the kind of racial composition favored by whites. Since 57 percent of elementary pupils were black, the only way to get a group of majority-white schools was to create a group of all-black schools. The proposed plan groups two-thirds of the white pupils in majority-white schools by the expedient of creating ten all-black schools.

Both courts below acknowledged this Court's holdings rejecting "white flight" as a justification for continued segregation in other contexts. United States v. Scotland Neck Board of Education, 407 U.S. 484, 491 (1972), and Monroe v. Board

of Commissioners, 391 U.S. 450 (1968). But they limited those precedents to school districts operating dual systems. Neither court mentioned the fact that the objective of stemming "white flight" was explicitly racial. This plan is based on the board's policy of trying to "stabilize" the ratio of black and white pupil at about 60% black and 40% white. A purpose to manipulate the racial composition of the school system is not a racially neutral or color blind purpose. The concurring opinion in Scotland Neck, supra, 407 U.S. 484, 493, by the Chief Justice (joined by Justices Blackmun, Powell, and Rehnquist) makes exactly this point where "white flight" was urged to justify the creation of a separate school system, and the proposal was held unconstitutional in part because:

> "...the Scotland Neck severance was substantially motivated by the desire to create a predominantly white system more acceptable to the white parents of Scotland Neck. In other words, the new system was designed to minimize the number of Negro children attending school with the white children residing in Scotland Neck." Id. at 493.

So in Norfolk the board set out to stop the district from becoming 75% or greater black, as its consultant predicted, and to stabilize the racial ratio. The recommended means of accomplishing this was to control the racial composition of the schools attended by white pupils, so as to attract whites to attend the system. The cost of attracting whites was segregating blacks in all-black "neighborhood" schools. This is as deliberate a segregation policy as any ever encountered, and is none the less unconstitutional because it is overt and not covert. And of course cases indicating that a benign

consideration of "white flight" might help promote integration do not assert that such a purpose is color blind or that it is permissible as a justification for creating ten all-black schools. Nor is the policy any less racial because blacks in the all-black schools can "volunteer" to transfer out, or because the board promises to make the "separate" schools "equal".

The combination of an explicitly racial purpose and a substantially segregative impact makes out a plain violation of the Fourteenth Amendment. See Keyes, supra. There is no requirement that the plaintiffs also prove that the board adopted the plan with malice toward black children. The fact that Norfolk's present school authorities sincerely do not believe that integration is worthwhile does not justify segregation in 1986 any

more than the similar views of their predecessors did. Brown v. Board of Education, supra, is premised on the harm segregation does to black children and not on the theory that the proponents of segregation necessarily had malice toward them.

It is enough to show a violation of the Equal Protection Clause that the purpose of the board in abandoning the desegregation plan was to appeal to the views of white people who opposed the desegregation plan. Black people are not accorded equal protection of the laws when a school board acts to segregate black children because white people prefer a different racial composition in the schools. See Monroe, supra; Scotland Neck, supra; cf. Cooper v. Aaron, 358 U.S. 1 (1958).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted and that the judgment below should be reversed.

Respectfully submitted,

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RACIAL COMPOSITION OF NORFOLK PUBLIC SCHOOLS, 1969, 1983 AND PROPOSED PLAN.
SOURCES: PX 144, 147(proposed plan based on 1984 assignments before transfers).

ELEMENTARY SCHOOLS	1969 WHITE	1969 BLACK	1969 TOTAL	1969 BLACK %	1983 WHITE	1983 BLACK	1983 TOTAL	1983 BLACK %	PROPOSED WHITE	PROPOSED BLACK	PROPOSED TOTAL	PROPOSED BLACK %
Bowling Park	0	934	934	100.0%	110	460	570	80.7%	0	665	665	100.0%
Tidewater Park	0	513	513	100.0%	100	220	320	68.8%	0	291	291	100.0%
Young Park	0	572	572	100.0%	149	198	347	57.1%	0	541	541	100.0%
St.Helena	4	357	361	98.9%	161	220	381	57.7%	3	343	346	99.1%
Chesterfield	51	671	722	92.9%	135	314	449	69.9%	4	427	431	99.1%
Monroe	13	1185	1198	98.9%	163	281	444	63.3%	7	701	708	99.0%
Roberts Park	0	513	513	100.0%	65	213	278	76.6%	10	489	499	98.0%
Jacox	(All black Jr. High school in 1969)				238	442	680	65.0%	13	630	643	98.0%
Tucker	0	477	477	100.0%	143	128	271	47.2%	7	336	343	98.0%
Diggs Park	0	677	677	100.0%	121	242	363	66.7%	10	315	325	96.9%
Lindenwood	0	713	713	100.0%	142	376	518	72.6%	139	464	603	76.9%
Willard	(opened 1979)				214	537	751	71.5%	183	519	702	73.9%
Norview	406	273	679	40.2%	209	481	690	69.7%	224	475	699	68.0%
Larrymore	1067	115	1182	9.7%	282	515	797	64.6%	313	581	894	65.0%
Granby	642	20	662	3.0%	223	270	493	54.8%	252	447	699	63.9%
Ingleside	428	22	450	4.9%	272	430	702	61.3%	288	433	721	60.1%
Crossroads	1046	73	1119	6.5%	324	314	638	49.2%	336	446	782	57.0%
Ghent	(opened 1978)				232	266	498	53.4%	267	353	620	56.9%
Oakwood	0	442	442	100.0%	164	199	363	54.8%	226	277	503	55.1%
Suburban Park	542	36	578	6.2%	235	359	594	60.4%	198	241	439	54.9%
Poplar Halls	560	22	582	3.8%	106	235	341	68.9%	220	258	478	54.0%
Larchmont	630	100	730	13.7%	379	243	622	39.1%	334	335	669	50.1%
Fairlawn	512	10	522	1.9%	128	230	358	64.2%	183	182	365	49.9%
Coleman Place	865	0	865	0.0%	327	437	764	57.2%	452	363	815	44.5%
Calcott	841	0	841	0.0%	177	286	463	61.8%	293	196	489	40.1%
Meadowbrook	561	41	602	6.8%	283	259	542	47.8%	320	213	533	40.0%
Taylor	383	0	383	0.0%	245	140	385	36.4%	232	154	386	39.9%
Willoughby	750	36	786	4.6%	396	127	523	24.3%	212	120	332	36.1%
Camp Allen	(opened 1970)				316	496	812	61.1%	332	187	519	36.0%
Sewell Pt	603	275	878	31.3%	444	138	582	23.7%	420	217	637	34.1%
Sherwood Forest	666	0	666	0.0%	323	311	634	49.1%	437	188	625	30.1%
Oceanair	678	29	707	4.1%	356	301	657	45.8%	491	201	692	29.0%
LittleCreek	1254	2	1256	.2%	423	560	983	57.0%	747	291	1038	28.0%
Tarrallton	631	14	645	2.2%	137	213	350	60.9%	295	83	378	22.0%
Ocean View	1002	81	1083	7.5%	310	407	717	56.8%	434	90	524	17.2%
Bay View	874	0	874	0.0%	261	210	471	44.6%	575	102	677	15.1%

ELEMENTARY SCHOOLS	1969 WHITE	1969 BLACK	1969 TOTAL	1969 BLACK %	1983 WHITE	1983 BLACK	1983 TOTAL	1983 BLACK %	PROPOSED WHITE	PROPOSED BLACK	PROPOSED TOTAL	PROPOSED BLACK %
Carey	0	366	366	100.0%(closed 1978)								
Gatewood	0	453	453	100.0%(closed 1979)								
Goode	0	392	392	100.0%(closed 1972)								
Liberty Park	0	553	553	100.0%(closed 1980)								
Lincoln	0	378	378	100.0%(closed 1972)								
Smallwood	0	474	474	100.0%(closed 1970)								
Titus	0	519	519	100.0%(closed 1979)								
Titustown	0	277	277	100.0%(closed 1970)								
West	0	472	472	100.0%(closed 1980)								
Lee	7	449	456	98.5%(closed 1974)								
Marshall	10	525	535	98.1%(closed 1978)								
Campostella	45	136	181	75.1%(closed 1976)								
Stuart	281	559	840	66.5%	143	224	367	61.0%(proposed closing)				
Easton	410	45	455	9.9%	102	192	294	65.3%(proposed closing)				
Lansdale	716	32	748	4.3%(closed 1981)								
Pineridge	245	10	255	3.9%(closed 1978)								
Lakewood	746	27	773	3.5%	38	53	91	58.2%				
Lafayette	271	6	277	2.2%(closed 1972)								
Ballentine	252	1	253	.4%(closed 1980)								
East Ocean View	168	0	168	0.0%	195	84	279	30.1%(proposed closing)				
Pretty Lake	124	0	124	0.0%(closed 1980)								
Total Elementary	18284	13877	32161	43.1%	8771	11611	20382	57.0%	8457	12154	20611	59.0%

Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1962

No. 85-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAUL R. RIDDICK, JR., *et al.*,

Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF NORFOLK, *et al.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1815

Paul R. Riddick, Jr., and Phelicia Riddick, infants, by Paul R. Riddick, their father and next friend,

Cynthia C. Ferebee, Johnny Ferebee, Gary Ferebee, and Wilbert Ferebee, infants, by Rev. Luther M. Ferebee, their father and next friend,

Anita Fleming, infant, by Blanche Fleming, her mother and next friend,

Darrell McDonald and Carolyn McDonald, infants, by Ramion McDonald, Sr., their father and next friend,

Eric E. Nixon and James L. Nixon, infants, by Patricia Nixon, their mother and next friend, Johnny Owens; Trent Owens; Myron Owens, Shawn Owens, and Antonio Owens, infants, by Annette Owens, their mother and next friend; Paul R. Riddick, Rev. Luther M. Ferebee, Blanche Fleming, Ramion McDonald, Sr., Patricia Nixon, and Annette Owens,

Appellants

versus

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1815

Paul R. Riddick, Jr., and Phelicia Riddick, infants, by Paul R. Riddick, their father and next friend,

Cynthia C. Ferebee, Johnny Ferebee, Gary Ferebee, and Wilbert Ferebee, infants, by Rev. Luther M. Ferebee, their father and next friend,

Anita Fleming, infant, by Blanche Fleming, her mother and next friend,

Darrell McDonald and Carolyn McDonald, infants, by Ramion McDonald, Sr., their father and next friend,

Eric E. Nixon and James L. Nixon, infants, by Patricia Nixon, their mother and next friend, Johnny Owens; Trent Owens; Myron Owens, Shawn Owens, and Antonio Owens, infants, by Annette Owens, their mother and next friend; Paul R. Riddick, Rev. Luther M. Ferebee, Blanche Fleming, Ramion McDonald, Sr., Patricia Nixon, and Annette Owens,

Appellants

versus

The School Board of the City of Norfolk Thomas G. Johnson, Jr., Dr. John H. Foster, Dr. Lucy R. Wilson, Jean C. Bruce, Cynthia A. Heide, Robert L. Hicks, Hortense R. Wells,

Appellees

The Lawyers' Committee for Civil Rights Under Law,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, Chief Judge. (C/A 83-326N)

Argued January 8, 1985
Decided February 6, 1986

Before WIDENER, SPROUSE and ERVIN, Circuit Judges.

Henry L. Marsh, III (S. W. Tucker; Randall G. Johnson; Hill, Tucker & Marsh, on brief) and Julius Levonne Chambers (James M. Nabrit, III: Napoleon B. Williams, Jr.; Gwendolyn Jones Jackson; Delk, James & Jackson: Elizabeth Turley; Little, Parsley & Cluverius, on brief) for Appellants; Jack E. Greer (J. Anderson Stalnaker; M. Wayne Ringer; Williams, Worrell, Kelly & Greer; Philip R. Trapani, on brief) for Appellees; William Bradford Reynolds, Assistant Attorney General (Charles J. Cooper, Deputy Assistant Attorney General; Michael Carvin, Department of Justice, on brief) for Amicus

Curiae United States: (Fred N. Fishman; Robert H. Kapp; Norman Redlich; William K. Robinson; Conrad K. Harper; Eleanor M. Fox: Richard E. Meade: Simpson Thacher & Bartlett, on brief) for Amicus Curiae The Lawyers Committee for Civil Rights Under Law.

WIDENER, Circuit Judge:

The plaintiffs, Paul R. Riddick and others, appeal the district court's refusal to invalidate a new pupil assignment plan for the elementary schools (grades K-6) of the City of Norfolk. Under the new assignment plan, mandatory cross-town busing, required at first by court order in 1971, is abolished. In its place, students are assigned in most instances to neighborhood schools, with a transfer provision with free transportation for minority students who desire it.[1] Plaintiffs contend that adoption of the

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[1] Secondary schools are not affected by the plan. Busing is continued for them.

new assignment plan was racially motivated and that its implementation violates their constitutional rights under the Fourteenth Amendment to the United States Constitution. We affirm.

I. Background

To better understand the issues involved in the instant appeal, the history of litigation arising out of racial segregation in Norfolk's public schools should be examined. Prior to the Supreme Court's opinion in Brown v. Board of Education, 347 U.S. 483 (1954), segregation of public schools in Norfolk and elsewhere in Virginia was sanctioned by state law.

In 1956, litigation began which sought the integration of Norfolk's public schools. Beckett v. School Board of the City of Norfolk, 148 F.Supp. 430 (E.D. Va.), aff'd 246 F.2d 325 (4th Cir.), cert.

den. 355 U.S. 855 (1957). Following intervention of additional plaintiffs, the case became styled Brewer v. School Board of the City of Norfolk, see 349 F.2d 414 (4th Cir. 1965) (referred to herein as Brewer or Beckett).

In 1970, this court upheld a finding that the Norfolk school board operated a dual school system based on race. Brewer, 434 F.2d 408, 410 (4th Cir.), cert. den. 399 U.S. 929 (1970). The district court was ordered to implement a plan in order to achieve a unitary school system in Norfolk. Brewer, supra, at 412. Following the Supreme Court's decision in Swann v. Charlotte-Mecklenburg Board of Education. 402 U.S. 1 (1971), the court again remanded Brewer to the district court for implementation of a desegregation plan conforming with Swann's expanded scope of remedies. Brewer, sub nom. Adams

v. School District No. 5, Orangeburg Co., S.C., 444 F.2d 99 (4th Cir), cert. den. 404 U.S. 912 (1971).

Following remand, the district court adopted a desegregation plan which utilized pairing and clustering of schools in Norfolk, as well as cross-town busing in the assignment of students to accomplish desegregation. This court affirmed implementation of the busing plan with a modification of the plan to provide for free transportation for those students bused. Brewer v. School Board of the City of Norfolk, 456 F.2d 943 (4th Cir.), cert. den. 406 U.S. 933 (1972).

Three annual reports by the school board were reviewed by the district court following its 1971 order. In 1975, the district court determined that racial discrimination had been eliminated

from the Norfolk school system and that the school system had become unitary. Therefore, the district court dismissed the Beckett action. The full text of that order is:

ORDER

It appearing to the Court that all issues in this action have been disposed of, that the School Board of the City of Norfolk has satisfied its affirmative duty to desegregate, that racial discrimination through official action has been eliminated from the system, and that the Norfolk School System is now "unitary," the Court doth accordingly

ORDER AND DECREE that this action is hereby dismissed, with leave to any party to reinstate this action for good cause shown.

/s/ JOHN A. MacKENZIE
United States District Judge

Dated: February 14, 1975

We ask for this:

/s/ Henry L. Marsh, III
Counsel for Plaintiffs

/s/ Allan G. Donn
Counsel for Detendants

No appeal was taken from the order dismissing the case. No legal action was taken with respect to the desegregation of Norfolk's public schools from 1975 until the present action was filed in 1983.

Although no longer under court order, the Norfolk school board continued cross-town busing until 1983. At that time, the board concluded that declining white enrollment figures required that the busing plan be modified to abolish mandatory busing of elementary school students. In its stead, the board adopted a pupil assignment plan based on geographic zones for its elementary schools. The board sought district court approval of its proposed plan by filing a motion to reinstate the Beckett case and by filing a civil action, School Board of the

City of Norfolk v. Bell, et al, No. 83-225-N (E.D. Va. 1983). The Riddick plaintiffs (those presently before the court) thereafter filed this class action suit challenging the proposed pupil assignment plan. The board voluntarily dismissed the Bell case and withdrew its motion in the Beckett case. The issues raised in those proceedings are raised here.

II. Facts

In 1970, the population of Norfolk was 307,951, 70% (215,069) white and 28% (87,261) black. The Norfolk public schools enrolled 56,830 pupils during the 1969-70 school year, 57% (32,586) of those students being white and 43% (24,244) being black.

In 1980, the population of Norfolk had declined more than 11% to 266,979, 61% (162,300) white and 35% (93,987) black.

The public school enrollment, racially and otherwise, had even more drastically changed. By the 1980-81 school year, enrollment had shrunk to 36,643, a 37% drop in overall enrollment. Even more startling, the white enrollment that year was 15,629 or 42.6% of the total school enrollment. Black enrollment (21,014) now comprised 57.4% of the total school enrollment. While the overall percentage of white enrollment had dropped 14.4%, white school enrollment had dropped 52%, although the white population decreased only 24%. By 1983, school enrollment was down to 34,803, 58% (20,191) black and 42% (14,611) white.

Largely because of the drop in overall student enrollment during those years, 17 elementary schools were closed. Most of these schools closed were located in predominantly black neighborhoods.

Since 1971, the school board had used a 70%-30% ratio in assigning students under the busing plan. A school was considered as a racially identifiable black school if its enrollment consisted of more than 70% black students. In 1977, one elementary school was over 70% black. By 1981, seven elementary schools were over 70% black. During this same period, parental involvement, as shown by PTA membership, dropped dramatically, from 15,000-20,000 down to 3,500.

Alarmed about the continued loss of white students from the public school system and the drastic drop in parental involvement, the school board appointed an ad hoc committee in 1981 to examine the feasibility of reducing cross-town busing. The committee members initially were Mrs. Jean Bruce, Mrs. Hortense Wells, Tommy Johnson, Robert Hicks, and John

Foster. It was later expanded to a committee of the whole. The Committee members visited other school systems to study their desegregation programs, including the Shreveport, La. and Richmond, Va. school systems. A task force was appointed to produce data for the committee.[2] The committee communicated with experts in the field for consultation, including Dr. Ron Edwards, Dr. Robert Green, Dr. Sarah Lightfoot, and Dr. David Armor. Three members of the ad hoc committee favored a proposal ending busing of elementary school students. Dr. Foster opposed the change.

The board engaged Dr. Armor to prepare a report on the problems of continued integration of Norfolk's schools. Armor concluded that mandatory

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[2] Its members included Dr. Jane Carter, Dr. John McLaulin, and Dr. Aaron Gay.

busing had led to significant white flight and that if busing continued, the Norfolk school system would be 75% black by 1987. At the point of 75% black, no matter in which year it occurred, of course the average black child could not expect to be educated in a desegregated school according to the 70/30 definition used and which Armor stated was consistent with most definitions of segregation. Busing, he said, had aided the obtainment of racial balance but such balance was of little aid as the system was resegregating with the rapid loss of white students. He concluded that under such circumstances busing did not significantly aid black academic achievement and that white student enrollment would stabilize if busing were eliminated.

The board held a series of public hearings to present the new pupil assignment plan.[3] Groups both opposed to and supportive of the new plan presented their views at these hearings. Supporters of the plan were concerned with the lengthy transportation of their children, with problems inherent with having their children in schools far from their homes, with lack of parental involvement in these distant schools and with a general feeling that busing was not working. Those opposed to changing the busing plan expressed concerns over the number of schools that would become almost completely black, the adverse effects of such separation of the races, fear that

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[3] An alternate plan, Plan II, was also presented at these hearings. That plan provided for changing but not eliminating busing but did not meet with public support.

the segregation of the past was returning and concern that busing was needed to guarantee equal allocation of both material and human resources.

III. The Proposed Plan

On February 2, 1983, the Norfolk school board adopted the "Proposal For a Voluntary Stably Desegregated School System" by a vote of 5-2.[4] Under the plan, cross-town busing of elementary school students was eliminated.[5] All of the ele-

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[4] Those school board members in favor of the new plan included Thomas Johnson (white), Jean Bruce (white), Cynthia Heide (white), Mrs. Hortense Wells (black), and Robert Hicks (white). Those opposed were Rev. John Foster (black) and Dr. Lucy Wilson (black).

[5] Of thirty-seven elementary schools at the time of trial, there were twenty-two elementary schools attended by students that were bused. One of those, Ghent Elementary School, offered an open classroom program and accepted students from anywhere in the city. The remaining fourteen schools were single attendance zone schools whose students were not bused.

mentary schools became single attendance zone schools (neighborhood schools). Those single attendance zones were gerrymandered so as to achieve maximum racial integration.[6] Students attending any certain elementary school were fed into a certain one of eight junior high schools. Under this feeder plan, all the junior high schools were fully integrated racially. The maximum black/white ratio was 72/28, and the minimum 56/44.

Under the plan, twelve of Norfolk's thirty-six elementary schools will be 70% or more black, compared to four under the busing plan presently in effect. Of those

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[6] Plaintiffs do not challenge the method by which the zones were drawn, or the zones themselves, but instead challenge the plan as a whole.

twelve schools, ten will be 95% or more black. Six schools will become 70% or more white.[7]

School	Projected Assignment	% White	% Minority
Bay View	710	84	16
Bowling Pk.	589	1	99
Calcott	563	61	39
Camp Allen	689	62	38
Chesterfield	572	1	99
Coleman Place	970	47	53
Crossroads	714	37	63
Diggs Pk.	381	2	98
Fairlawn	282	73	27
Granby El.	674	44	56
Ingleside	665	38	62
Jacox	769	1	99
Larchmont	685	52	48
Larrymore	768	31	69
Lindenwood	492	21	79
Little Cr.El&Pri	1037	75	25
Meadowbrook	512	61	39
Monroe	831	0	100
Norview	602	32	68
Oakwood	415	35	65
Oceanair	672	71	29
Oceanview	586	78	22
Poplar Halls	388	43	57
Roberts Pk.	401	0	100
St. Helena	355	2	98
Sewells Pt.	664	64	36
Sherwood For.	627	70	30
Suburban Pk.	539	55	45
Tarrallton	548	48	52
Taylor	487	54	46
Tidewater Pk.	276	2	98
Tucker	312	3	97

The plan contains a majority-minority transfer option, described in Swann, p. 26, as a "useful part of every desegregation plan." Under this option, any student assigned to attend a school at which his race constitutes 70% or more of the student body can transfer to a school where his race constitutes less than 50% of the students. The plan provides for free transportation for those students choosing such a transfer. The school board estimates that 10-15% of eligible students would take advantage of the M/M transfer the first years. Five year projections show as many as 40% of the students may opt for M/M transfers. If 20% of those eligible black students

Willard	802	26	74
Willoughby	558	65	35
Young Pk.	510	1	99
Ghent	600	(open classroom program)	

opt for M/M transfer, only one school would remain more than 70% white. Some of the ten schools with 95% or more black pupils would have smaller percentages of black students but all would yet be above 95%.

The plan also provides for multi-cultural programs to expose students in racially isolated elementary schools to students of other races. A parental involvement program is also included.

A Plan II was drawn up by Dr. John Foster which reduced the length of bus rides for elementary students but increased the number of students that would be bused. No school would have been less than 25% of any one race. Plan II would have required the redrawing of all of the attendance zones in the school system. That plan was also presented at the public hearings. No support was ex-

pressed for Plan II at those hearings, and the plan was not adopted by the board. Plaintiffs do not here seek an adoption of Plan II in lieu of the plan adopted: they seek a return to the original busing plan.

IV. District Court Opinion

On July 9, 1984, the district court upheld the constitutionality of Norfolk's proposed plan for elementary school assignments. As a preliminary matter, the court held that its 1975 ruling that Norfolk's school system was unitary was fully supported by the record and remained in effect at the time of this suit. In so concluding, the court rejected plaintiffs' argument that the 1975 order was merely a consent decree and therefore had no effect upon these plaintiffs.

The court held that the 1975 order had the effect of placing the burden of proof on the plaintiffs instead of the

defendant school board. The burden was on the plaintiffs to show that the proposed plan was adopted by the board with an intent to discriminate on the basis of race. Upon entry of the 1975 order, the court reasoned, the Norfolk school board had discharged its affirmative duty to desegregate its schools. Thus, as of the 1975 order, the school board was no longer operating a de jure dual school system with a concomitant duty to desegregate as required by Brown and later cases. Because no de jure discrimination was present, the plaintiffs were required to show that the school board acted with an intent to discriminate as required by Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), and Washington v. Davis, 426 U.S. 229 (1976).

Finally, the district court found that the plaintiffs had not satisfied their burden of proving discriminatory intent. In reaching that conclusion, the court reviewed the six aspects of public education which must be free from racial discrimination before a system can become unitary: faculty, staff, transportation practices, extracurricular activities, facilities and pupil assignment. Green v. County School Board, 391 U.S. 430, 435 (1968).

There follows, briefly stated, the district court's findings of fact and conclusions of law in its analysis of that question.

Norfolk's school board was racially mixed, composed of four white and three black members. The superintendent of the schools, Dr. Gene R. Carter, was black. Two of the three Regional Assistant

Superintendents were black. The faculty was 56% white and 44% black. Black personnel comprised 52% of the total. Such data reflected that the faculty and staff were fully integrated. Relying on this, the district court rejected plaintiffs' allegation that school resources would inequitably be distributed with predominantly white schools receiving a greater percentage of these resources. In addition, the court noted the new plan itself required periodic judicial review of the school board's allocation of educational resources.

The court found credible the testimony of expert witnesses that Norfolk would continue to lose white students because of busing and that over a period of time the school system would become predominantly black. Norfolk's school system might well become 90% black as are

systems in cities such as Baltimore and Washington, D.C., or 86% black as in Richmond, resulting in resegregation regardless of busing and pupil assignment plans. The court found that Norfolk had lost between 6000-8000 white students because of busing.[8] As a result of this white flight, Norfolk's schools were resegregating under the busing plan.

The district court recognized that white flight cannot be used as a reason for failure to dismantle a dual school system. United States v. Scotland Neck Board of Education, 407 U.S. 484 (1972). The consideration of white flight in devising a voluntary plan to improve the racial balance of the schools was

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[8] Students were lost from the public schools in two ways, those who left the schools after once being enrolled and those who settled in communities surrounding Norfolk instead of Norfolk itself.

proper however. Higgins v. Board of Education of City of Grand Rapids, 508 F.2d 779 (6th Cir. 1974). It found the board's consideration of white flight was proper because it was voluntarily attempting to keep its schools stably integrated. It was under no affirmative court order to desegregate at the time. Such consideration was not a pretext for racial discrimination. In sum, the district court found that keeping white students in the schools was necessary to insure a desegregated education, and, since the white students had been lost because of busing, the board was justified in reducing the busing in an effort to keep white students.

Likewise, the court found as a fact and credited the board's second reason for adoption of the proposed plan, that of seeking an increase in the level of

parental involvement. All the evidence at trial, both from plaintiffs and the board, indicated that parental involvement at the elementary level was essential to the well-being of the school system. Because of busing, however, parental involvement through the vehicle of the PTA had been virtually destroyed. PTA enrollment had dropped from approximately 15,000-20,000 members to 3,500 members. During this period of declining enrollment, the board had tried to bolster membership by various means, including providing free transportation to parents to enable them to attend meetings at their children's school. The board's efforts were unsuccessful. Evidence at trial convinced the court that parental involvement declined as a result of their children attending schools across town instead of close to their home with resulting easy

access of parents to the school. The proposed plan offered by the board represented a reasonable proposal to try to solve the dilemma of declining parental involvement.

Based upon the above reasoning and fact findings, the court rejected the plaintiffs' contention that the proposed plan was adopted for the purpose of racial discrimination. It found that neither the board's purpose of trying to create a stably integrated student body nor its effort to increase necessary parental involvement was pretextual. Therefore, the district court found that plaintiffs had not carried their burden of proving intent to discriminate on the part of the school board.

The court also rejected the plaintiffs' claim that discriminatory intent can be inferred from the procedure used by

the board in considering and adopting the proposed plan. It found that the board had followed a thorough and reasonable procedure, including creating a special committee, hiring experts and holding six public hearings throughout the community. It also found no basis in fact for the plaintiffs' claim that the board had acted in concert with local housing authority officials to determine the location of housing projects[9] and thereby determine the location of black elementary schools.

Plaintiffs appeal the district court's order rejecting their claim of intentional discrimination by the school board in adopting the proposed plan for

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[9] Twenty-five percent of Norfolk's black families live in public or subsidized housing projects. These twenty-two projects are occupied almost exclusively by black residents

neighborhood elementary schools in Norfolk. Specifically, they claim error in (1) the district court's holding that the 1975 order declaring the Norfolk school system to be unitary remains effective and applicable to this lawsuit; (2) the district court's conclusion that Norfolk's school system is in fact unitary: (3) the court's conclusion that the burden of proof in this action is upon the plaintiffs to prove intent to discriminate by the school board; and (4) the court's holding that the school board's actions were not motivated by racial criteria in violation of the Fourteenth Amendment. We will consider these arguments in turn.

V. Effect of 1975 Order

In 1975, the district court in Beckett found that the Norfolk school system had "satisfied its affirmative

duty to desegregate, that racial discrimination through official action [had] been eliminated from the system and that the Norfolk School System [was] 'unitary'." That holding marked the culmination of almost two decades of desegregation litigation in Norfolk. The Beckett litigation was effectively completed in 1971 when a busing order was entered. Following its entry, the district court monitored the school system for four years and became satisfied that the system had ridded itself of racial discrimination. Being satisfied that the plan had succeeded in eradicating segregation, the court dismissed the suit.

Plaintiffs contend that the 1975 order is no more than a consent order entered by the parties and therefore is not binding upon them. While the plaintiffs are correct in stating that, as

a general rule, all consent orders do not necessarily have collateral estoppel effect, United States v. International Bldg. Co., 345 U.S. 502 (1953), we believe that the 1975 order was not a compromise judgment.[10] Id. at 506. As previously noted, that order culminated a lengthy and hotly contested lawsuit which resulted in the ending of segregated schools in Norfolk. The court monitored the desegregation plan for several years and, after finding that all of the claims raised in the complaint had been disposed of, dismissed the case. Because the court made findings on the merits of the plaintiffs' claims for relief, the order is not a consent order in settlement of a suit but is an order on the merits of the same. The

[10] See generally 1B Moore's Fed. Practice ¶ .444[3] for a discussion of the collateral estoppel effect of consent orders.

fact that the parties agreed to the order does not alter that conclusion. International Bldg. Co. supra, at 506. Unlike an order compromising a claim by agreement, the district court in the order now contested ruled on the questions of law and fact in dispute. Because the order represents the court's findings on the issues raised and not a compromise entered into by the parties, the consent order exception to application of collateral estoppel principles is inapplicable here.

Such a conclusion is consistent with the duty placed upon district courts in disposing of school desegregation cases. A district court is under an obligation to retain Jurisdiction over the school system under a proposed integration plan to determine its effectiveness in achieving desegregation. Swann,

supra, 402 U.S. at 21; Green, supra, 391 U.S. at 439; Raney v. Board of Education, 391 U.S. 443, 449 (1968). It is required to retain jurisdiction until it determines that the school system has become unitary. United States v. Texas Ed. Agency, 647 F.2d 504, 508 (5th Cir. 1981). Such a determination should only occur after the district court has retained Jurisdiction over the school system to make certain that "it is operated in a constitutionally permissible fashion so that the goal of a desegregated, nonracially operated school system is rapidly and finally achieved." Raney, supra, 391 U.S. at 449; Felder v. Harnet Co. Board of Education, 409 F.2d 1070, 1075 (4th Cir. 1969). The district court followed the monitoring procedure as it was required to do. It did not end the litigation until it was satisfied that the

school system was free from racial segregation. Such active participation by the court belies any argument that the 1975 order is anything less than a judgment on the merits.

Plaintiffs next contend that the 1975 order should be given no effect here because the United States, a party to the prior action, was not given notice of, nor consented to, that order. Plaintiffs have no standing to raise such a claim, especially since the United States does not challenge the 1975 order. See generally the government's brief 12-15.

We likewise reject plaintiffs' argument that the 1975 order is not to be given effect here because it was not a final order. That contention derives from language in the order that the action "is dismissed, with leave to any party to reinstate this action for good

cause shown." If we consider that only final orders are to be given preclusive effect, Kasper Wire Works, Inc. v. Leco Engineering & Mach., 575 F.2d 530, 537-8 (5th Cir. 1978),[11] we find no violation of that maxim here. The 1975 order concluded a complex legal battle of almost twenty years' duration in which all parties had ample opportunity to be heard. That order could have been appealed under 28 U.S.C. § 1291 if the parties so chose. They did not. The order finally disposed of all remaining issues in the litigation, and it could have been appealed. As such, preclusion principles attach.

The fact that the district court gave the parties an opportunity to reinstate the cause upon the docket with a showing of good cause does not alter our

[11] See 18, Wright, Miller & Cooper Federal Practice and Procedure, § 4432.

holding. That language is not dissimilar to the language in Fed. R. Civ. Pro. 60(b) which allows parties to seek relief from a judgment under certain prescribed circumstances. Rule 60(b) specifically provides, however, that such opportunity to seek relief from judgment does not affect the finality of an order. We believe that the same reasoning should apply here.

Plaintiffs further argue that the 1975 order should not be binding on them because the district court did not comply with Fed. R. Civ. Pro. 23(e) by giving notice to members of the class prior to dismissal or compromise of the class action. We have found that the 1975 order is not a voluntary dismissal or compromise but instead represents an adjudication on the merits. Thus, such an order is not subject to 23(e)'s notice

requirements. See Shelton v. Pargo, Inc., 582 F.2d 1298, 1300 n. 1 (4th Cir. 1978); Hutchinson v. Fidelity Inv. Assoc., 106 F.2d 431 (4th Cir. 1939); Wright & Miller, Federal Practice and Procedure, 1972, § 1797, p. 235-236.

Once a court decides an issue of law or fact necessary to its judgment, that decision can be binding upon a party to it if the party was given a "full and fair opportunity to litigate [the] issue in the earlier case." Allen v. McCurry, 449 U.S. 90, 94-5 (1980). The Court has summarized its thoughts in Montana v. United States, 440 U.S. 147, 153-4 (1979):

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies....' South-

> ern Pacific R. Co. v. United States, 168 U.S. 1, 48-49 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. (Citations omitted) Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. (Citation omitted) Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within the jurisdictions. (Citation omitted) To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. (Footnote omitted)

The principles of collateral estoppel or issue preclusion are applicable to school desegregation cases. Los Angeles Branch NAACP v. L.A. Unified School Dist., 750 F.2d 731 (9th Cir. 1985); Bronson v.

Board of Education of City School Dist., 687 F.2d 836 (6th Cir. 1982); 525 F.2d 344 (6th Cir. 1975).

Plaintiffs' final claim on this point is that they have not had a full and fair opportunity to litigate the unitary finding. The Beckett plaintiff class represented black school students in the Norfolk school system. It litigated for almost twenty years. Norfolk's black school children are the plaintiffs here. While the actual makeup of class members may be different because of the passage of time (as it is bound to have been at the beginning and ending of Beckett), we believe that the two classes are in sufficient privity for the principles of collateral estoppel or issue preclusion to apply. Bell v. Board of Educ. Akron Public Schools, 683 F.2d 963 (6th Cir. 1982); Bronson, supra, 525 F.2d at

349. The Beckett plaintiffs had a full and fair opportunity to contest the district court's 1975 unitary finding. These plaintiffs cannot now relitigate that issue here. Los Angeles Branch NAACP, supra; Bronson, supra: see Azalea Drive-In Theatre, Inc. v. Hanft, 540 F.2d 713 (4th Cir. 1976), cert. den. 430 U.S. 941 (1977).

Mindful of the Court's admonition in Montana, p. 163, that "[un]reflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law when responsiveness to changing patterns of conduct or social mores is critical," we nevertheless conclude that the district court did not err in finding that its 1975 order was binding upon these parties.

VI. Norfolk as a Unitary School System

The question of whether the Norfolk school system was unitary at the time of the trial was explored at trial, perhaps with the intent to show that the school system was not unitary in 1983 and 1984 although it might have been in 1975.

In Green v. County School Board, 391 U.S. 430 (1968), the Court for the first time spoke of the goal of school desegregation as the transition of a dual school system into a unitary one. The Green plaintiffs brought suit challenging the freedom of choice plan initiated in New Kent County, Virginia.[12] New Kent County is a rural county in eastern Virginia. Its school system consisted of two schools, a white school serving grades 1-12 and a

[12] The freedom of choice plan allowed the student to choose the public school he wished to attend, with minor qualifications not pertinent here.

black school serving the same grades. School segregation had existed, of course, in all parts of Virginia prior to Brown I, under both constitutional and statutory command. When the Green complaint was filed, pupil assignment in the county was governed by a pupil placement board created by state law. Green at 432-3. Students were generally reassigned each school year to the school they had attended the prior year unless they sought reassignment by the placement board. After the Green suit was filed, the school board adopted a freedom of choice plan to desegregate their two schools.

In finding the freedom of choice plan constitutionally inadequate as a remedy under the facts of that case, the Court first concluded that the county had established and operated a school system under state law like that forbidden by Brown - a

"dual system, part 'white' and part 'Negro'." Green, supra, 391 U.S. at 435. Additionally, the county had delayed the dismantling of that dual system, and the freedom of choice plan had induced only 15% of Negro students to attend the formerly all white school. No white student had attended the all Negro school. Within that factual setting, the freedom of choice plan did not provide any meaningful assurance that the dual system would be promptly dismantled. The facts showed otherwise because, after three years of operation under the freedom of choice plan, 85% of the county's black students still attended all black schools.

Under the mandate of Brown "[s]chool boards ... then operating state-compelled dual systems were ... clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a

unitary system in which racial discrimination would be eliminated root and branch." Green, supra, 391 U.S. at 437-8. All aspects of public education must be freed from the vestiges of state sanctioned racial segregation before a school system becomes unitary. Integration must occur in the system's faculty, staff, transportation practices, extracurricular activities, facilities and pupil assignment. Green, supra, 391 U.S. at 435.

As we have previously stated, the mere implementation of a desegregation plan does not convert a dual system into a unitary one. United States v. Texas Ed. Agency, supra, 647 F.2d at 508.

The district court here found that its 1975 finding that the Norfolk school system had achieved a unitary status was a correct one and that the school system retained its unitary status until the pre-

sent. It found that "the Norfolk School Board is an integrated body, the Norfolk school administration is racially balanced, the racial composition of the faculty and staff is mixed, and the overwhelming majority of school children, of both races, on the elementary, junior and senior high school levels, attend schools whose student bodies are racially mixed. In addition, there has been no contention, nor could there be one, that the extracurricular activities, transportation network and school facilities are operated in a dual fashion. Finally ... there has been no challenge to any of the Board's actions in the Beckett litigation since some time before the 1975 order was entered."

Our review of the district court's findings that the school system is unitary is under Fed. R. Civ. Pro. 52(a)'s re-

quirement that findings of fact be set aside only if clearly erroneous. Vaughns v. Board of Education of Prince George's Co., 758 F.2d 983 (4th Cir. 1985). Factual findings by a district court in school desegregation cases, especially where the presiding judicial officer has lived with the case for many years, are entitled to great deference on review. Vaughns, supra, at 990; see Goldsboro City Board of Education v. Wayne Co. Board of Education, 745 F.2d 324, 327 (4th Cir. 1984); Columbus Board of Education v. Penick, 443 U.S. 449, 457 n. 6 (1979).

Under the clearly erroneous standard, a reviewing court may not reverse the findings of the trial court simply because it would have decided the case differently. "If the district court's account of the evidence is plausible in light of the

record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, N.C., ___ U.S. ____, 53 U.S.L.W. 4314, 4317 (1985). This rule applies even when the district court's findings rest upon physical or documentary evidence. We are cautioned that our appellate role is violated if we seek to decide the matter anew.

We cannot say that the trial court's finding that the school system is unitary is clearly erroneous. The evidence in the record supports the court's conclusion that the faculty and staff are fully integrated. Three of the seven board members

are black. The superintendent and two of the three regional assistant superintendents are black. No serious question is raised that the faculty and staff are still segregated, and we agree that no such segregation exists.

The district court found that the overwhelming majority of Norfolk's students attend racially mixed schools. The statistics in the record bear out that conclusion. As a general rule, the school board has been able to keep its elementary schools within the 70%-30% guideline adopted in the early 1970's.[13] We agree with the district court's finding that Norfolk's students are attending integrated schools. No one argues that the school

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[13] Following the district court's order, the school board defined racially identifiable schools as those with fewer than 30% or more than 70% minority or non-minority students.

facilities, extracurricular activities or transportation system are operated in a dual manner. We note again that the busing of students continues in grades 7-12.

The district court reviewed all six factors set out in Green and found that Norfolk's school system had remained unitary since 1975. There is substantial evidence in the record to support such a finding. We therefore affirm its holding.

VII. Effect of the Unitary Finding

This brings us to the principal issue in this appeal: What effect does the finding that Norfolk's school system is unitary have upon the prosecution of a constitutional challenge to the proposed neighborhood school assignment plan? What procedure governs a challenge to a student assignment plan for a school district that historically practiced de jure

segregation but had obtained a valid judicial order that it has ridded itself of all vestiges of that racial discrimination? A related inquiry must be to what extent and for how long must a previously discriminating school system submit to judicial control. Does judicial involvement end when unitary status is achieved or does judicial involvement continue in perpetuity to prevent resegregation absent a showing of intent to discriminate?[14]

The district court concluded that its finding that the Norfolk school system is unitary had the effect of shift-

[14] We decide the case under the de facto/de jure distinction which we think is the law. See, e.g., Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). One respected commentator, however, has predicted the distinction could not survive. See Bickel, Untangling the Busing Snarl, The New Republic, Sept. 23, 1972. The separate opinions of Justices Douglas and Powell in Keyes take the position that it should not.

ing the burden of proof from the defendant school board to the plaintiffs. It held that plaintiffs had the burden of proving that the school board implemented the contested pupil assignment plan with an intent to discriminate on the basis of race.

Plaintiffs disagree with the allocation of the burden of proof by the district court. They claim that the burden of proof remains on the school board to prove that implementation of the new assignment plan will not perpetuate the vestiges of the past de jure dual system. While we find no case which has addressed the issue under a fact situation the same as present here, we agree with the district court's allocation of the burden of proof.

Since 1954, de jure racial segregation in public schools has been unlawful as in violation of the Fourteenth Amendment to

the Constitution. Brown, supra. Such discriminating schools were placed under an "affirmative duty to 'effectuate a transition to a racially non-discriminatory school system'." Keyes v. School Dist. No. 1, Denver, Col., 413 U.S.189, 200 (1973), quoting Brown v. Board of Education, 349 U.S. 294, 301 (1955) (Brown II). State sanctioned dual school systems must take whatever steps are necessary to completely eliminate racial discrimination. Dayton Board of Ed. v. Brinkman, 443 U.S. 526, 537-8 (1979); (Dayton II); Columbus Bd. of Ed. v. Penick, 443 U.S. 449, 458-59 (1979); Swann, supra, 402 U.S. at 15; Green, supra, 391 US. at 437-8. Each instance of a refusal or failure to perform its duty to desegregate constitutes a constitutional violation by the school board. Columbus Bd. of Ed., supra, at 459, citing other cases.

Once a plaintiff shows that segregation exists in a school system that was authorized or required by state law at the time Brown was decided, it follows as a matter of course that the school authorities have a duty to eliminate such segregation. Keyes, supra, 413 U.S. at 200-3. The board cannot satisfy its duty by merely abandoning its prior discriminatory purpose. Nor can it take any action that would impede the process of converting to a unitary system. Dayton II, supra, 443 U.S. at 538. The board is under a heavy burden of showing that any action it takes that continues the effects of the illegal dual system serves a legitimate end. Id. The burden remains upon the school board to dismantle the segregated system and convert to a "unitary system in

which racial discrimination [is] eliminated root and branch." Green, supra, 391 U.S. at 438.

Rescission of a voluntary desegregation plan itself may be found to be an act of segregation for a school board which has been found to have practiced de jure segregation and has not completed the transition from a dual to a unitary school system. NAACP v. Lansing Bd. of Ed., 559 F.2d 1042 (6th Cir.), cert. den. 434 U.S. 997 (1977). In a school system that has not become unitary, the school board is not barred from ever changing a desegregation plan. In such a situation, however, the board must show that the proposed changes are consistent with its continuing affirmative duty to eliminate discrimination. Clark v. Board of Educ. of Little Rock School Dist., 705 F.2d 265 (8th Cir. 1983).

The continued existence of a small number of one race schools within such a school district does not establish in and of itself a constitutional violation. Swann, supra, 402 U.S. at 26: Clark, supra, 705 F.2d at 272. The burden is upon the school board, however, to show that the existence of such schools are genuinely nondiscriminatory and not vestiges of past segregation. Swann, supra, 402 U.S. at 26; Davis v. E. Baton Rouge Parish School Bd., 721 F.2d 1425, 1434 (5th Cir. 1983).

A district court is under a duty to enter a desegregation order that will go as far as possible toward eliminating segregation. Green, supra, 391 U.S. at 438 n. 4. The court's equitable powers in such decrees are broad indeed, but they are not plenary. They are limited to those cases in which a constitutional vio-

lation has occurred, either where a de jure segregated system exists, where intent to discriminate is presumed, or where a de facto segregated system exists and intent to discriminate has been proven. In situations in which a school board has defaulted on its obligations, the court can use its broad powers to fashion a remedy in order to assure a unitary system. Swann, supra, 402 U.S. at 16.

Once such a remedy is fashioned, the district court retains jurisdiction until it is clear that the unlawful segregation has been completely eliminated. But once the goal of a unitary school system is achieved, the district court's role ends. See, generally, Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424 (1976). Foreseeing such a time, the Swann Court stated:

At some point these school authorities and others like them should have achieved full compliance with this Court's decision in Brown I. The systems would then be 'unitary' in the sense required by our decisions in Green and Alexander.

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Swann, supra, 402 U.S. at 31-32.

In Pasadena. supra, 427 U.S. 424, the Court again recognized that the right of the federal courts must end when the objective sought has been achieved. A court ordered desegregation plan was adopted in 1970 which provided that students must be assigned in such a manner so that no school in the district would be comprised of "a majority of any minority students." Id. at 428. The district court retained jurisdiction in the case. Neither party appealed, and the plan became effective that same calendar year.

Four years later, the school board returned to court, seeking, among other things, relief from the no "majority of any minority students" provision in the form of a lifting of the court's injunction. The district court refused to grant the school board relief from its

order primarily because it perceived that the school board had not properly complied with its order after the first year it was in force. The school board had adjusted attendance zones in 1970 to comply with the order but had not readjusted each year thereafter. As a result, schools slipped out of literal compliance with the not to exceed 50% mandate by the next school year. By the time of the district court hearing, five of the system's 32 schools no longer met the less than 50% rule. Id. at 431. The district court made clear that it expected the school board to readjust student attendance figures yearly to comply with the court's ruling. Id. at 433. The court of appeals found that the district court had not abused its discretion in imposing such an annual requirement.

The Supreme Court disagreed. Initially, it found that the district court was impermissibly requiring a "particular degree of racial balance or mixing" which Swann expressly condemned. Id. at 434. While such a racial balance can be a starting point on the road to complete desegregation, it reasoned, it can never be an inflexible requirement.

Next, the Court rejected the district court's authority to impose such a requirement absent a showing that the defendant school board was responsible for the intervening changes in the racial composition of the schools. The Court relied approvingly on the cautionary language of Swann that "'it must be recognized that there are limits' beyond which a court may not go in seeking to dismantle a dual school system. [Citation omitted] These limits are in part tied to the necessity

of establishing that school authorities have in some manner caused unconstitutional segregation, for '[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis'." Id. at 434.

The district court had found a constitutional violation in 1970 and thus had the initial authority to cause the reassignment of students on the basis of race. But once Pasadena adopted a racially neutral system, no further constitutional violation could be found unless by acts attributable to the school board. At that point, the district court exceeded its authority by requiring the readjustment of attendance zones absent such a constitutional violation. Because the school board was not responsible for the demographic shifts in the population

which caused the schools to slip out of compliance, it was under no duty to adjust school attendance figures to reflect those changes. The Court concluded that "having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance zones." Id. at 436-7.

We have only recently examined both Pasadena and Swann and concluded that a district court's power to effect additional remedial orders is limited. "Once a school system has achieved unitary status, a court may not order further relief to counteract resegregation that does not result from the school system's intentionally discriminatory acts." Vaughns,

supra, at 988. Other courts have reached the same conclusion. Davis, supra, 721 F.2d at 1435 ("Changes in neighborhood ethnicity taking place after school officials have transformed their system into a unitary one need not be remedied, of course, for school officials are under no duty to adjust for the purely private acts of those who chose to vote with their feet."); Ross v. Houston Independent School Dist., 699 F.2d 218, 225 (5th Cir. 1983) ("When state officials have not only made good faith efforts to eliminate the vestiges of segregation, but have actually achieved a school system clean of every residue of past official discrimination, immutable geographic factors and post-demographic changes that prevent the homogenation of all student bodies do not bar judicial recognition that the school system is

unitary.") But see United States v. Hendry Co. Sch. Dist., 504 F.2d 550, 554 (5th Cir. 1974) ("We cannot tolerate resegregation of a former dual school system, and the school board of such a system must demonstrate that the new construction will not tend to promote such a relapse." The decision was prior to Pasadena, however.)

We agree with the district court that Swann and the cases that follow, both in the Supreme Court and in the courts of appeals, require a plaintiff to prove discriminatory intent on the part of the school board of a unitary school system.

We think the rationale of these cases is applicable here. We recognize some factual differences between those cases, where factors outside the school board's control such as demographic changes cause the racial composition of schools to

change, and the case we consider today, where an act of the school board in changing a part of a desegregation plan results in the shifting racial composition of the schools. We do not take lightly this factual distinction but conclude that the plaintiffs must be required to carry the burden of proving discriminatory intent.

While we find no case decided in the same situation as that before us, the Ninth Circuit has alluded to markedly similar facts in holding that the district court must relinquish jurisdiction over the Pasadena case following remand. Spangler v. Pasadena, 611 F.2d 1239 (9th Cir. 1979). Following the Supreme Court decision in Pasadena, the school board sought to have the district court dissolve the injunction entered in the case and

relinquish jurisdiction.[15] The district court refused to end its oversight over the Pasadena school system.

The court of appeals concluded that the district court's refusal was based upon a belief that "unless it retained jurisdiction, the Board might at some future date, by action or inaction, cause or suffer to occur some degree of avoidable, 'resegregation.'" Spangler, supra, at 1240.[16] In reversing that decision, the Ninth Circuit relied upon the three factors set out in Millikin v. Bradley, 433 U.S. 267, 280-1 (1977) (Millikin II), in ascertaining the propriety of the remedial

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[15] The district court had previously refused such a request, which refusal was affirmed on appeal. Spangler, supra, 519 F.2d 430, rev'd on other grounds, 427 U.S. 424.

[16] Judges Goodwin and Kennedy delivered separate opinions. Judge Anderson concurred in the reasoning and result of both, thus both are opinions of the court.

measures to be used following a finding of de jure school segregation. First, the court must consider the nature and scope of the constitutional violation; second, the remedial objective sought is to be the restoration of the victims of discrimination to the position they would have occupied absent the constitutional violation: and, third, consideration must be given to the interests of allowing state and local authorities to manage their own affairs. Finding all three factors were met following nine years of court supervision, the Ninth Circuit concluded that the time had come to end court intervention in Pasadena's school system. 611 F.2d at 1240-1241 (Judge Goodwin).

Judge Kennedy's opinion set out in more detail the basis for the district court's concerns over resegregation. The district court feared that once jurisdic-

tion terminated, the school board planned to return to a neighborhood school plan as had existed before the 1970 court ordered desegregation plan. If the neighborhood plan were readopted, the racial composition of Pasadena's schools would revert to approximately what it was before the desegregation plan. Spangler, supra, at 1243. School board members had made it known publicly that they endorsed return to a neighborhood school plan. It was upon these facts that the district court based its finding of continuing intentional discrimination by the school board. Spangler, supra, at 1244.

The court found (Judge Kennedy) that the district court had committed errors of law in reaching that conclusion. Initially, the district court appeared to be requiring a certain racial balance to be maintained in Pasadena's schools, a con-

cept disapproved by the Supreme Court. It said "[t]he Supreme Court has emphasized that when a large percentage of minority students in a neighborhood school results from housing patterns for which school authorities are not responsible, the school board may not be charged with unconstitutional discrimination if a racially neutral assignment method is adopted.... From the standpoint of racial balance in pupil assignments, compliance with the [court's desegregation plan] for nine years is sufficient in this case, given the nature and degree of the initial violation, to cure the effects of previous improper assignment policies." Spangler, supra, at 1244.

It rejected the district court's justification that continuing jurisdiction was required to prevent readoption of a neighborhood school plan with its concomi-

tant change in racial balance, and found that adoption of a neighborhood plan was not necessarily synonymous with an intent to discriminate. "Adopting a student assignment method different from the [court's plan] may have the foreseeable effect of increasing racial imbalance in the Pasadena schools. This fact is relevant in determining whether a plan was adopted as a result of invidious intent, but other factors must also be examined.... The fact that the Board has explored assignment alternatives which may increase racial imbalance provides little support for the conclusion ... that the proposal, if adopted, would result from constitutionally infirm motives." Spangler, supra, at 1245.

Both opinions agreed that if a new student assignment plan were adopted in Pasadena with the intent to discriminate, a new suit could be brought to challenge such a plan. In the absence of such intentional acts, authority to run the school system should be returned to the school board. Spangler, 611 F.2d at 1241, 1242, 1247.

The 1975 order of the district court in Norfolk returned control of the city's schools to the school board by its finding that the school system was unitary. Nothing in the record about events between then and the proposal of the pupil assignment plan here in question has changed that situation. The Norfolk board recently took the very action the court considered to be contemplated by the Pasadena school board. While the Ninth Circuit had only the question of termina-

tion of district court jurisdiction before it, that court made clear that following such relinquishment, a plaintiff must prove that the school board acted with an intent to discriminate in adopting a new student assignment plan. We find that reasoning persuasive and consistent with our reasoning in Vaughns. We hold that the burden of proving discriminatory intent attaches to a plaintiff once a de jure segregated school system has been found to be unitary.

Once a constitutional violation has been remedied, any further judicial action regarding student assignments without a new showing of discriminatory intent would amount to the setting of racial quotas, which have been consistently condemned by the Court in the context of school integration absent a need to remedy an unlawful condition. Pasa-

dena, supra, 427 U.S. at 433-4; Millikin v. Bradley, 418 U. S. 717, 740-41 (1974) (Millikin I); Swann, supra, 402 U.S. at 24-5. Racial quotas are to be used as a starting point in remedying de jure segregation but not as an ultimate goal to be continued in perpetuity. Indeed, since almost every action of a school board with respect to pupil assignments in a mixed school system necessarily affects racial balance, if we were to require the Norfolk school board to justify every action it takes that affects the racial balance of its schools, we would make a finding that the school system is unitary virtually meaningless in that context. The 1975 unitary finding marks the end of de jure segregation in the system. Following such a finding, control of the system must be allowed to return to local officials. No one seriously disputes that

public education has traditionally been a local concern. Generally, Millikin I, supra, at 741-2. And the power of the federal courts is not plenary, Swann, p. 16; rather, it depends upon a constitutional violation for its exercise. Pasadena, p. 434.

We reject plaintiffs' argument that the Norfolk school board must continue to justify all of its actions because of the history of segregation. While that history of discrimination cannot and should not be ignored, it "cannot in the manner of original sin, condemn governmental action that is not itself unlawful." City of Mobile v. Bolden, 446 U.S. 55, 74 (1980) (plurality opinion of the Court by Justice Stewart). If the rule were otherwise, virtually every action of the school board with respect to any of its various affairs would be suspect. And, to repeat, we

keep in mind that while the history of discrimination is not dispositive, it is relevant to a court's determination of the school board's intent.

Plaintiffs' reliance on cases such as Columbus Board of Education, supra, 443 U.S. 449; Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) (Dayton II); Keyes, supra, 413 U.S. 189; Swann, supra, 402 U.S.; and Green, supra, 391 U.S. 430, for placing the burden of proof on the school board is misplaced because all of those cases involved state sanctioned discriminating school districts that had not dismantled their dual systems. None had reached the goal of a unitary system as Norfolk has done.

VIII. Plaintiffs' Proof

We next consider whether or not plaintiffs met their burden of proof. Plaintiffs raise errors both of law and

fact in the district court's decision making process. Initially, they claim the district court erred in its approval of the school board's consideration of white flight as one reason for abandonment of busing of elementary school children. We agree with plaintiffs that white flight cannot be used as a justification for failing or refusing to dismantle a dual school system. United States v. Scotland Neck Board of Education, supra, 407 U.S. at 491; Monroe v. Board of Commissioners, 391 U.S. 450, 459 (1972). White flight cannot be used as an excuse to resist or evade a present duty to desegregate. But the Norfolk school board is not operating a dual school system with a present duty to desegregate.

Consideration can be given to the phenomenon of white flight under certain circumstances. As the Sixth Circuit said

in a much quoted opinion "[i]t does not follow that a board must ignore the probability of white flight in attempting to formulate a voluntary plan which would improve the racial balance in the schools without at the same time losing the support and acceptance of the public.... [T]here is a valid distinction between using the defense of white flight as a smokescreen to avoid integration and realistically considering and dealing with the practical problems involved in making voluntary efforts to achieve integration." Higgins, supra, 508 F.2d at 794 (emphasis in the original). The circuits have consistently followed this language and allowed consideration of white flight in the formulation and adoption of integration plans. Lee v. Anniston City School System, 737 F.2d 952, 957 n. 3 (11th Cir. 1984); Liddell v.

State of Mo., 731 F.2d 1294, 1314 (8th Cir. 1984), cert. den. 105 S.Ct. 82; Johnson v. Bd. of Education of City of Chicago, 604 F.2d 504, 516-517 (7th Cir. 1979), vacated on other grounds, 449 U.S. 915 (1980); Parents Assn. of Andrew Jackson High School v. Ambach, 598 F.2d 705, 719-20 (2d Cir. 1979); Stout v. Jefferson Co. Bd. of Ed., 537 F.2d 800, 802 (5th Cir. 1976).

We are of opinion the district court correctly concluded that the school board could legitimately consider the presence of white flight in the pursuit of a voluntary plan to stabilize school integration in Norfolk. We reject plaintiffs' argument that under Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the neighborhood school plan is suspect because its assignments are based upon race. School assign-

ments are based upon the residence of the child, not the race of the child. Plaintiffs present no evidence to support a finding that such a residential classification is a pretext for discrimination based on race. The board assigned students to schools under the new plan solely on the basis of their residence. The only consideration of race involved was an effort on the board's part to gerrymander the school assignment lines to result in the maximum amount of integration possible.

The concept of a neighborhood school system in and of itself is not violative of the Constitution. E.g. Crawford v. Los Angeles Board of Education, 458 U.S. 527, 537 n. 15; Swann, supra, 402 U.S. at 28; Thompson v. Sch. Bd. of City of Newport News, Va., 465 F.2d 83 (4th Cir. 1972). Congress has recognized that

absent discrimination the neighborhood school is the appropriate basis for school assignments. 20 U.S.C. § 1701. Without more, we find nothing constitutionally suspect in the board's preference for a neighborhood school plan.

Whether white flight was present in Norfolk during the relevant times is of course a question of fact. The district court concluded that the evidence revealed a significant amount of white flight from Norfolk's public schools. It found that the system lost 6000-8000 white students because of busing. It further found that because of this exodus of white students, the school system was becoming more and more black and faced the real danger of resegregation. As set forth in Part VI, supra, our review of such factual findings is limited by the clearly erroneous rule. We conclude that there are

sufficient facts in the record to support the district court's finding that white students are leaving the public schools because of busing. The school attendance figures show that white students have gone from a 60% majority to a 42% minority during the decade of the 1970's. By 1982, whites comprised only 40.87% of the total school enrollment.[17] During this same time

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[17] An agreed trial exhibit reveals the following race distributions for public school students, elementary and secondary:

	White	Black	Total	Percent White**
1967-68	33,838	22,546	56,384	60.00
1968-69	33,103	23,023	56,126	59.00
1969-70	32,586	24,244	56,830	57.00
1970-71	30,246	24,425	54,671	55.32
1971-72	25,858	23,930	49,788	51.94
1972-73	24,224	23,578	47,802	50.68
1973-74	24,337	24,714	49,051	49.62
1974-75	23,536	24,451	47,987	49.05
1975-76	22,957	24,420	47,377	48.46
1976-77	22,080	23,976	46,056	47.94
1977-78	20,412	23,282	43,694	46.72
1978-79	18,913	22,686	41,599	45.47
1979-80	16,373	21,395	37,768	43.35
1980-81	15,629	21,014	36,643	42.65
1981-82	14,435	20,885	35,320	40.87

frame, white residents continued to be a majority of the city, falling from 70% to 60%. Clearly, white students are leaving Norfolk's public schools at a much higher rate than they are leaving the city itself.

In addition to students who attend private schools, Norfolk's public schools were losing those students whose families would otherwise move into the city but who chose to move elsewhere to avoid busing. In 1981, for example, Virginia Beach (273,600) and adjoining Norfolk (273,000) were almost the same size but the school system in Virginia Beach (54,776) was more than half again larger than that of Norfolk (35,816). This supports the dis-

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** "White" - includes approximately 3% other minority races.

trict court's finding that a disproportionate number of white families are choosing to move to Virginia Beach.

Dr. Gene Carter, superintendent of the Norfolk school system, testified that students had left the city's public schools because of the mandatory busing plan. Former superintendent, Dr. Albert Ayars, an opponent of the neighborhood plan, nevertheless recognized that some students were leaving the system because of busing.

Plaintiffs argue that the district court's findings are clearly erroneous because their school enrollment figures show that white enrollment in the public schools had stabilized during the early 1980's. These figures set out below[18] reveal that black students com-

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[18] Summary seventh day enrollment
Norfolk Public Schools
1969-1983

prised 42.4% of the student population in 1969. That percentage consistently increased until 1981 when blacks represented 59.2% of the students. In 1982, the black percentage dropped to 58.8% and to 58% the following year. Plaintiffs rely upon this slight increase in white student enrollment over two years

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	W	B	T	%B
1969	32603	24000	56603	42.4
1970	30229	24418	54647	44.7
1971	25836	23921	49757	48.1
1972	24196	23568	47764	49.3
1973	24304	24699	49003	50.4
1974	23504	24442	47946	51.0
1975	22934	24411	47345	51.6
1976	22036	23949	45985	52.1
1977	20365	23251	43616	53.3
1978	18873	22658	41531	54.6
1979	16336	21361	37697	56.7
1980	15600	20995	36595	57.4
1981	14427	20892	35319	59.2
1982*	14521	20735	35256	58.8
1983*	14611	20191	34802	58.0

* 1982 and 1983 figures for whites include "others."

to show that white flight, if ever present, had ended. There is evidence in the record to show that this overall increase in enrollment since 1980 is an aberration due to housing patterns of the Navy during this time. Even absent such an explanation, plaintiffs' enrollment figure differences are not sufficient for us to find that the district court was clearly erroneous. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson, supra, 53 U.S.L.W. at 4317.

It is also claimed that the board's reliance upon a decrease in parental involvement under the busing plan is merely a pretext for discriminating on the basis of race. As we have previously noted, one of the board's concerns in amending its busing plan was

the dramatic drop in parental involvement. No one disputes that such involvement is critical to the well-being of a school system. Former Superintendent Ayars testified that according to a Gallup poll parental involvement was characterized as the "most significant factor in the education of a child." Dr. Ayars himself considered parental involvement "vital" to the health of a school system.

The district court found that Norfolk's public schools were facing a crisis because of the sharp decline in parental involvement. PTA enrollment had dropped from 15,000-20,000 to 3500. Dr. Ayars testified that busing "virtually destroyed" Norfolk's PTA. Efforts to increase parental involvement had been somewhat successful but much more needed to be done to encourage parental interest.

Superintendent Carter testified that many parents had approached him regarding their inability to participate in their children's education under the busing plan. School board members also expressed concern over the lack of parental involvement in the public schools. The district court found that Norfolk's public schools faced a crisis because of the sharp decline in parental involvement during the years of busing and that the new plan offered a reasonable alternative to counter such a decline. We agree. The Norfolk school board was faced with the difficult task of bringing parents back into the school system. These parents stopped participating during the time their children attended schools across town. For many, a lack of transportation to those distant schools could have served as a stumbling block to their participa-

tion. For others, the extra time and expense required to drive across town may have prevented their participation. For still others, the feeling of a lack of community with a cross-town school may have been a factor. Returning these children to schools close to their homes represented a reasonable attempt to once again obtain the involvement of their parents in the school system.

Plaintiffs contend that the district court's findings regarding parental involvement are clearly erroneous because prior attempts by the school board had been successful in obtaining the return of parents to the schools. Former Superintendent Ayars did testify that a past effort had succeeded in obtaining many parents to volunteer to assist in planning school programs. Dr. Ayars admitted, however, that much more

needed to be done to increase the number of parents involved at the elementary school level. Plaintiffs also contend that PTA enrollment figures are an inappropriate method of measuring parental involvement. They offer no alternative method, however. We know of no better gauge of parental interest in a school system than involvement in its PTA program. We find substantial evidence in the record to support the district court's conclusion that the school board's concern over parental involvement was not a pretext for racial discrimination.

Plaintiffs also argue that discriminatory intent can be seen in the board's failure to follow normal procedures in adoption of the proposed plan. These improper procedures include raising the busing issue at a board meeting where such a topic was not on the agenda and when

busing's leading proponent, Dr. John Foster, was absent. Plaintiffs also fault the board for failure to solicit the opinions of Dr. Ayars and for failing to investigate the psychological impact of such a neighborhood plan on black children.

The district court properly found that the decision making procedure followed by the board was reasonable and not indicative of discriminatory intent. The actions taken by the board show nothing short of a reasonable, deliberative process where the citizens of Norfolk were encouraged to speak up and express their views. The board's adoption of the neighborhood plan was not the result of a single meeting behind closed doors. Instead, the board first established a committee to investigate the issue. That committee appointed a task force to obtain

data on the subject. The committee visited several school systems to study their plans. The board solicited the opinions of several experts in the field and retained Dr. Armor for more extensive findings. Six public meetings were held to elicit public comment and criticism. We know of little else the board could have done to make the procedure more fair and open.[19]

We find plaintiffs' remaining claims to be without merit. Plaintiffs fear that school resources will be inequitably distributed under the new plan so that schools with predominantly white students will receive more than their fair share of both material and human resources. As we have pointed out, the school adminis-

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[19] Acting with the utmost caution, the board also sought judicial review of the proposed plan before implementation.

tration is completely integrated. The superintendent and two of the three regional assistant superintendents are black. Blacks comprise 41% of the system's principals and 44% of its teachers. We conclude that plaintiffs' fears are not enough to prove a claim such as this when the decision-makers in the system are themselves integrated. We are additionally reminded that the plan itself provides for judicial review of resource allocation.

Plaintiffs infer discriminatory intent from the board's failure to provide for an alternative plan should the neighborhood plan be unsuccessful at stopping the exodus of white students. We agree with the district court that such a failure would not have an appreciably different effect than continuation of the

busing plan under present trends. In either case, the school system would become predominantly black.

We find no evidence in the record to support the plaintiffs' contention that the school board and the housing authority have acted in concert with the intent to discriminate on the basis of race. As the district court pointed out, Norfolk's housing projects were constructed as a general rule to replace slum areas in the city. Those residents displaced by that demolition were given priority in assignment to the new housing projects. No one disagrees that most of those residents were black, and blacks still represent the vast majority of housing project tenants in Norfolk. This record shows no evidence by either the housing authority

or the school board to assign such housing by race following the culmination of the Beckett[20] case.

We think the district court was correct in its holding that the discriminatory impact alone shown here is not sufficient to make out such a claim. Arlington Heights, supra, 429 U.S. at 266: Washington, supra, 426 U.S. at 242. Such impact is clearly relevant to a determination of intent, however. Columbus Bd. of Ed., supra, 443 U.S. at 464; Dayton II, supra, 443 U.S. at 536 n. 9; Washington, supra, 426 U.S. at 242. In a school desegregation case in which intent is not

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[20] In 1969, the district court rejected such an argument in the Beckett litigation. 302 F.Supp. 18, 27. It concluded that housing patterns resulted from de facto segregation or a desire of blacks to live with blacks and whites to live with whites. This court did not disturb that finding when it considered the matter on appeal and reversed on other grounds. Brewer, supra, 434 F.2d 408.

presumed, a plaintiff must show a discriminatory purpose on the part of the defendant in order to make out a constitutional violation. This purpose, or intent to discriminate, marks the difference between de facto and de jure segregation. The finding that a school population is not homogenous, standing by itself, does not, absent intent, indicate a constitutional violation. Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406, 413: Swann, supra, 402 U.S. at 17-18. Hence, the presence of one-race schools within a community, standing alone, is not a violation of the Constitution. See Washington, supra, 426 U.S. at 240; Swann, supra, 402 U.S. at 26.

We agree with the district court that the evidence reveals that Norfolk's neighborhood school assignment plan is a reasonable attempt by the school

board to keep as many white students in public education as possible and so achieve a stably integrated school system. It also represents an attempt to improve the quality of the school system by seeking a program to gain greater parental involvement. While the effect of the plan in creating several black schools is disquieting, that fact alone is not sufficient to prove discriminatory intent. While the number of substantially all black schools in the system will not be decreased by the minority to majority option, the number of students attending such schools will be significantly decreased.

Our holding is a limited one, applicable only to those school systems which have succeeded in eradicating all vestiges of de jure segregation. In those systems, the school boards and not the

federal courts will run the schools, absent a showing of an intent to discriminate. We do not think this is a case in which a school board, upon obtaining a judicial decision that it is unitary, turns its back on the rights of its minority students and reverts to its old discriminating ways. If such were the case, we would, of course, not approve Norfolk's new assignment plan. But such is not the case. The school board of Norfolk has done a reasonable job in seeking to keep its schools integrated in the face of a massive exodus of white students. We should not tie its hands and refuse to allow it to try another plan that may be successful in stopping that exodus.

The district court has thoughtfully and carefully considered the complex issues before it, and its judgment is accordingly

AFFIRMED

Filed July 9, 1984

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

CIVIL ACTION NO. 83-326-N

PAUL R. RIDDICK, ET AL.,

Plaintiffs,

v.

SCHOOL BOARD OF THE
CITY OF NORFOLK, ET AL.,

Defendants.

MEMORANDUM OPINION

Procedural History of Recent Complaint

This suit was filed by the plaintiffs, parents of public school children, as a class action against the School Board of the City of Norfolk, Virginia, and the members thereof, on May 5, 1983. The suit challenges, on constitutional grounds, a new proposed pupil assignment plan (hereinafter "Proposed Plan") in which cross-

town busing of elementary school children is curtailed. The Proposed Plan was adopted by the School Board on February 2, 1983 and is scheduled for implementation in the school year beginning September, 1984. Plaintiffs contend that the adoption of the Proposed Plan was racially motivated and that its implementation would violate the rights of the plaintiffs under the Fourteenth Amendment.

Defendants contend that the present plan, with its massive crosstown busing, has had the effect of resegregating the school system and that continuation of the present plan would result in even further resegregation. Defendants argue that the Proposed Plan was adopted, in large measure, to promote stability in the school system and thereby to ensure that the Norfolk school system remains as desegregated as possible over the long term.

Past History of Proceedings

Desegregation litigation in Norfolk began in 1956, styled Beckett v. School Board of the City of Norfolk, before Judge Walter E. Hoffman. Beckett, renamed Brewer v. School Board of the City of Norfolk, became the individual docket responsibility of Judge John A. MacKenzie on July 7, 1971, and the district court decisions from that date, to the present, have all been those of Judge MacKenzie.

Following the decision in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), Brewer v. Norfolk School Board was remanded to the District Court by the Fourth Circuit Court of Appeals, with instructions to obtain from the Norfolk School Board a new desegregation plan which would give effect to Swann. Brewer, sub nom., Adams v. School

District No. 5, Orangeburg County, South Carolina, 444 F.2d 99 (4th Cir. 1971), cert. denied, 406 U.S. 933 (1972).

Acting under that mandate, this Court received a revised desegregation plan from the School Board. This plan, modified in some respects by this Court, was instituted by an Order of this Court entered in July 1971. The plan utilized several different methods of pupil assignment including single school attendance zones, groupings and pairings of schools, and a majority-minority transfer provision. It also ordered crosstown busing as a technique to overcome the remaining vestiges of Norfolk's dual school system. That plan was approved by the Fourth Circuit with the minor change that crosstown busing was to be without cost to the students. This pupil assignment plan, which was subjected

to periodic review over the next several years, is essentially the plan now in effect.

Background

In July 1971, when the current desegregation plan was instituted and busing began, the population of Norfolk was 307,951 of which 70% (215,096) were white and 28% (87,261) were black. The Norfolk school system in 1970 enrolled 56,830 pupils, of which 57% (32,586) were white and 43% (24,244) were black.

By 1983, when the Proposed Plan was adopted by the School Board, the situation had changed significantly. The 1980 Census pegged the population of the City of Norfolk at 266,979 of which 61% (162,300) were white residents and 35% (93,987) were black resident. Total enrollment in the Norfolk school system stood at 35,540 in 1983. And in 1983, the racial composition

of the school system was the following: 58% of the students (20,681) were black and 42% (13,327) were white. In the past twelve years then, there has been a 37% loss in enrollment (21,290) and, specifically, a drop in the white student population of 59% (19,259).

These figures are noteworthy in two respects: first, that the racial composition of the school population had reversed itself, in 1983 it was 58% black, 42% white while in 1970 it had been 57% white and 43% black. Second, while the population of the City of Norfolk was 61% white in 1983, the school population was 42% white. This is to be compared with the situation in 1971 when the City's population was 70% white and the school population was 60% white.

In 1970 there were fifty-four elementary schools. In 1983 there were only

thirty-six. This reflects the shrinking elementary school population as part of the 37% drop overall in school enrollment.

The Proposed Plan

On February 2, 1983, the School Board of the City of Norfolk adopted the Proposed Plan which provides for a change in the system by which pupils in the elementary grades are assigned to schools. The Norfolk school system operates thirty-six elementary schools, and defines the elementary grades to include Kindergarten through Sixth Grade (K-6). (One of the thirty-six elementary schools, Ghent Elementary, is not now and will not become a neighborhood school. It offers an open classroom program and any student may apply for admission to it.) At the present time, there are fourteen single attendance zone schools (an increase of twelve since 1971) while the other elementary students

in the school system are involved in the crosstown busing program. The Board has proposed instead that all elementary students attend single attendance zone schools (otherwise known, somewhat inaccurately, as neighborhood schools), the zones having been drawn to achieve the maximum amount of racial integration. The plaintiffs have not attacked the zones as drawn.

Under the Proposed Plan, crosstown busing for racial balance in Grades K-6 would be eliminated. The Proposed Plan would have the effect of increasing the number of black racially identifiable elementary schools from 7 to 12. (This Court considers a school to be "racially identifiable" if the school population contains more than 70% of a particular race.)

The Proposed Plan includes a Majority-Minority transfer option ("M/M transfer"). No student would be required to attend a school in which his race constitutes more than 70% of the student body. Under the M/M transfer program, the student could transfer, at his parents' option, to a school in which his race constitutes less than 50% of the student body. The school administration has calculated that 10-15% of those eligible for the M/M transfer program would choose to use it in the first year and that up to 30-40% of those eligible would opt for it over the next five years. After considering the evidence of experts for both the plaintiffs and defendants, this Court finds that the school administration's figures are a reasonable estimate of the outcome of the M/M transfer program. This Court therefore finds that the School

Board's figures--calculated on the basis that approximately 17-18% would opt to transfer--give a fair illustration of the effects of the M/M transfer program upon the elementary school population. After M/M transfers, only one elementary school would be over 70% white, i.e., Bayview (74%).

The Norfolk school system also includes Grades Seven-Twelve (7-12), located in eight Junior High Schools, five Senior High Schools and six Special Instruction Schools. These schools are not affected by the Proposed Plan. Under the Proposed Plan, crosstown busing will still be used to achieve racially mixed student bodies in those schools. The Proposed Plan creates a feeder pattern of elementary schools for the assignment of students to Junior High Schools. Each Junior High School will have a racially balanced stu-

dent body as a result. In short, these schools will retain their present characteristics.

While the Proposed Plan also involves the creation of programs designed to improve achievement, parental involvement, cross-cultural contacts and to ensure equal allocation of education resources, the major issues raised in this suit concerned the pupil assignment component.

The 1975 Order in Beckett v. School Board: Its Meaning

As has been pointed out, the desegregation plan for the Norfolk school system was entered in July 1971 by the same judge as here presiding, and remains the framework for the organization of the school system. In 1972, 1973 and 1974, this Court received reports which described, in considerable detail, the operation of the school system. In particular, this Court

reviewed the construction of new schools and the closing of other schools in 1972, 1973 and 1974. An application for the establishment of a transition school to aid school dropouts was opposed by the Beckett plaintiffs, but was nevertheless approved by this Court in August, 1972.

All of this activity culminated in an Order dated February 14, 1975, which is here fully set out:

LEOLA PEARL BECKETT, et al.,	:	
Plaintiffs	:	
v.	:	CIVIL ACTION NO. 2214
THE SCHOOL BOARD OF THE CITY OF NORFOLK, VIRGINIA, et al.,	:	
Defendants	:	

ORDER

It appearing to the Court that all issues in this action have been disposed of, that the School Board of the City of Norfolk has satisfied its affirmative duty to desegregate, that racial discrimination through official action has been eliminat-

ed from the system, and that the Norfolk School System is now "unitary," the Court doth accordingly

ORDER AND DECREE that this action is hereby dismissed, with leave to any party to reinstate this action for good cause shown.

/s/ JOHN A. MacKENZIE
United States Distrtict Judge

Dated: February 14, 1975

We ask for this:

/s/ Henry L. Marsh, III
Counsel for Plaintiffs

/s/ Allan G. Donn
Counsel for Defendants

The language of the Order of February 14, 1975 was fully agreed to by counsel for plaintiffs and defendants. Attorney's fees had been the only issue in the lawsuit for nearly three years before the entry of the Final Decree in February, 1975.

The Order of February 14, 1975, as appears on its face, was more than just a mere order of dismissal. Rather, the Order made specific findings

> "... all issues in this action have been disposed of
>
> "... that the School Board of the City of Norfolk has satisfied its affirmative duty to desegregate
>
> "... that racial discrimination through official action has been eliminated from the system [emphasis added]
>
> "... that the Norfolk School System is now 'unitary'...."

That Order was entered by the same judge who is now hearing this present action, after he had had the case in his charge for over four years and after he had been monitoring the operation of the school system for four years; at a time more than four years after he had ordered into effect the desegregation plan which today provides the structure by which the Nor-

folk school system is organized; at a time when the plan in effect had been unaltered in any appreciable respect since July, 1971, and which, incidentally, has remained essentially unaltered into 1984. No attempt to revive or reinstate the Beckett litigation was made during the nine years which passed from the time the Order was entered in 1975 until the present contest. This Court therefore cannot agree with the present efforts of plaintiffs to label the February 14, 1975 Order as a "Consent" Decree or an Order entered without the consideration of evidence to support its entry.

This Court finds that the Norfolk school system displays today, as it did in 1975, all indicia of "unitariness." In Green v. County School Board, 391 U.S. 430 (1968), the Supreme Court explained that a dual system was one in which,

> [r]acial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations --faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part "white" and part "Negro".

Id., at 435. It has now been twelve years since crosstown busing was introduced and almost 30 years since the start of desegregation litigation in Norfolk. Every piece of evidence in this case points to the fact that the Norfolk school system is unitary: the Norfolk School Board is an integrated body, the Norfolk school administration is racially balanced, the racial composition of the faculty and staff is mixed, and the overwhelming majority of schoolchildren, of both races, on the elementary, junior and senior high school levels, attend schools whose student

bodies are racially mixed. In addition, there has been no contention, nor could there be one, that the extracurricular activities, transportation network and school facilities are operated in a dual fashion. Finally, as noted elsewhere, there has been no challenge to any of the Board's actions in the Beckett litigation since some time before the 1975 Order was entered. Compare, Clark v. Board of Education of the Little Rock School District, 705 F.2d 265 (8th Cir. 1983); United States v. Texas Education Agency, 647 F.2d 504 (5th Cir. 1981), cert. denied, 454 U.S. 1143 (1982).

In short, this Court finds that its Order of February 14, 1975, was carefully considered for every phrase it contained. The Order manifested this Court's determination that, as a factual matter, the Norfolk system was free of discrimination and

was unitary in 1975. This Court holds that such a finding was fully justified in 1975 and remains a finding which is today fully justified.

Burden of Proof

What then is the effect of the 1975 Court Order? For the purposes of the present posture of this case, the effect of the Order is to shift the burden of proof from the defendant School Board to the plaintiffs, who must now show that the 1983 Proposed Plan results from an intent on the part of the School Board to discriminate on the basis of race.

It is well-established that a School Board which has maintained a dual school system has committed a constitutional violation. E.g., Keyes v. School District No. 1, 413 U.S. 189 (1973). (The same principle, of course, applies to school systems which have been maintained as dual

by operation of law. Brown v. Board of Education, 347 U.S. 483 (1954).) A dual system is one which is created by state authorities acting intentionally, with discriminatory purpose, to segregate the races. See, Keyes, 413 U.S. at 198; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 6 (1971). When such a constitutional violation has been found, the offending school board is then under a continuing affirmative obligation to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Green v. County School Board, 391 U.S. 430, 437-38 (1968); Swann, 402 U.S. 1 (1971). A school board charged with the duty to dismantle an existing dual system bears the burden of justifying its action in light of that duty. See,

Columbus Board of Education v. Penick, 443 U.S. 449, 460-61 (1979); Swann, 402 U.S. 1.

A different situation, however, is present in the suit at bar. This Court, in its 1975 Order, specifically held that the Norfolk School Board had fully discharged its affirmative obligation to create a unitary system, that the school system had shed its dual, de jure segregated character and that the system was unitary. Consequently, the burden now falls upon these plaintiffs to show that the defendant School Board's actions were taken in violation of the Constitution. In order to make this showing, plaintiffs must prove that the Board acted with an intent to discriminate. Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Keyes, 413 U.S. 189.

The presence of discriminatory intent will not be inferred solely from the disproportionate impact of a particular measure upon one race. As the Supreme Court has made clear, "... official action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.'" Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 264-265, quoting, Washington v. Davis, 426 U.S. at 242. Moreover, it is clear that the existence of one race or substantially one race schools is not unconstitutional without a showing that such schools were created for the purpose of discriminating on the basis of race. Keyes, 413 U.S. 189; See, Crawford v. Board of Education of the City of Los Angeles, 458 U.S. 527

(1982). Plaintiffs have attempted to carry their burden by pointing to various facts and circumstances regarding the adoption and effect of the Proposed Plan, specifically the following: that the impact of the Proposed Plan is such as to indicate discriminatory intent, that the procedures used by the Board in considering and adopting the Proposed Plan were suspect, that the Board improperly considered the effect of "white flight", and that the Board's stated justifications were pretexts for discrimination.

This Court finds that plaintiffs have failed to satisfy their burden. As will be developed below, the evidence in this case falls short of demonstrating the requisite discriminatory intent.

(The plaintiffs have made several arguments with respect to the allocation of the burden of proof, all of which this

Court rejects. First, plaintiffs argue that Swann requires the School Board to provide a nondiscriminatory justification as to why its Proposed Plan will create some schools with student bodies composed disproportionately of one race. However, Swann is inapplicable here. The questions resolved by the Supreme Court in Swann involved the fashioning of an appropriate remedy for the dismantling of a dual school system. In the case at bar, by contrast, the Norfolk school system has been held to be unitary and the question is whether the School Board has committed a constitutional violation in adopting the Proposed Plan. Second, plaintiffs contended that the principles announced in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), require that this Court strictly scrutinize the Pro-

posed Plan. As discussed in greater depth below, however, Bakke is inapplicable to this case.)

School Resources Allocation

Plaintiffs have argued that as a result of the adoption of the Proposed Plan, and the emergence of a larger number of racially identifiable black schools than presently exists, the resources of the school system might be unequally distributed. Specifically, plaintiffs suggest that the greater concern would be shown to schools with a larger percentage of white enrollment and that the better equipment and better faculty would be diverted to these schools. Such an argument is hardly worth the review of the evidence that thoroughly defeats it.

The School Board of Norfolk is racially mixed, with four white members and three black members. The administration

of the Norfolk school system is now in the capable hands of a very competent and integrated staff. The Superintendent of Schools, Dr. Gene R. Carter, is black. Two of the three Regional Assistant Superintendents are also black. There are 88 principals in the system, 59% are white, 41% are black. The faculty is likewise fully integrated, 56% white, 44% black. When all personnel are counted, including the maintenance staff, administration and faculty, the mix is 47% white, 52% black (1983 figures). Given that the staff is completely integrated and given that very qualified blacks are at the top of the organization, the fear that white students will stand to reap some benefit over black students is totally lacking in credence. And even though it is unlikely that additional oversight is necessary, the Proposed Plan specifically requires periodic

judicial review of the allocation of educational resources, both human and material.

Integration: New Plan as an Aid

A significant amount of expert testimony was solicited during the long trial of this case on the question of whether the scholastic achievement of students, black and white, is affected when the school they attend is racially mixed. In order to evaluate the Proposed Plan, and without attempting to balance the experts, let us assume that integration produces some positive impact upon achievement. Under this assumption, it becomes clear that the goal of any school plan must be to ensure that the greatest number of students of both races remain enrolled. And in fact, one of the purposes of the Proposed Plan is to stabilize elementary school population at its present ratio of

black students and white students, roughly 60-40. There is some speculation that with the Proposed Plan in place the ratio might be narrowed to 55-45.

If the Proposed Plan is successful and the racial composition of the school population stabilizes, the school administration will have considerably more white students for the purpose of integrating the system than it would have if the present plan continues in operation, according to various forecasts. As noted elsewhere in this opinion, even plaintiffs' experts recognize the distinct possibility that Norfolk will go the way of other central core cities whose school populations have become overwhelmingly minority, and that therefore Norfolk's student ratio may dwindle under the present plan to 75-25, black to white or 86-14, black to white, as in nearby Richmond, or even 90-10,

black to white, as in Washington and Baltimore. This Court gives credence to these predictions. Clearly then, given that experts on both sides indicate that stability in the level of white enrollment is a desirable objective, and given the assumption that the achievement of all students may be improved by having an integrated education, the possibility that the Proposed Plan would increase the number of white students would be a strong point in its favor.

Let us suppose the Proposed Plan fails to stem the tide of "white flight" and the racial composition of the student population fails to stabilize at 55-45, or 60-40, black to white. In such a situation, the number of elementary schools that can be racially identified as black will necessarily increase since white students will not be available in sufficient

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numbers to maintain integration. Thus, the failure of the Proposed Plan to retain white students would produce a result no different from that of the continued operation of the present plan.

If stability in the ratio of white elementary students to black elementary students is a proper goal, then a plan which would achieve that goal must be appropriate. If the Proposed Plan is successful, it will produce such a result, but if it fails, the result will be no worse than the outcome which appears to be likely with the continued operation of the present plan -- that is, resegregation. In short, the Proposed Plan represents a reasonable, voluntary attempt on the part of the School Board to ensure that the school system retains the greatest degree of integration over the long term.

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White Flight

The Court finds that the credible evidence in the case at bar reveals that there has been significant "white flight" from the Norfolk school system. Norfolk has experienced two types of "white flight": students who left the system after once having been enrolled in it, and families who have avoided settling in Norfolk but have instead settled in communities such as Virginia Beach or Chesapeake. The Court finds that, as a result of busing, the Norfolk school system has lost between 6000 and 8000 white students who otherwise would have been enrolled there.

The Court further finds that, as a result of this white flight, the Norfolk schools are faced with imminent resegregation. Dr. Crain, one of plaintiffs' key experts, stated in an unguarded moment

that the school population of the City of Norfolk was undoubtedly moving towards a high ratio of black to white. The situation in Norfolk is not unlike that of other nearby cities which, like Norfolk, have an older central core. In Richmond, for example, the racial composition of the student population stands at 86% black, 14% white even though it began at approximately the same level as that in Norfolk. In short, it is clear that the Norfolk school system faces a serious problem brought on by the effects of white flight.

It is well settled that "white flight" cannot be used as a justification for the failure to comply with the Court Order to dismantle a dual school system. The commands of the Constitution may not bend to the popular will. United States v. Scotland Neck Board of Education, 407

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U.S. 484 (1972); Davis v. East Baton Rouge Parish School Board, 721 F.2d 1425 (5th Cir. 1983). However, when the proper set of circumstances exists, white flight may be considered by the school board, and by the Court, in solving the integration equation. See, Parent Association of Andrew Jackson High School v. Ambach, 598 F.2d 705, 720 (2d Cir. 1979); Johnson v. Board of Education of Chicago, 604 F.2d 504, 516 (7th Cir. 1979), vacated and remanded for consideration of subsequent developments, 449 U.S. 915 (1980); Stout v. Jefferson County Board of Education, 537 F.2d 800, 802 (5th Cir. 1976); Higgins v. Board of Education of the City of Grand Rapids, 508 F.2d 779, 794 (6th Cir. 1974). This Court finds, as further developed below, that this case presents circumstances which make consideration of "white flight" appropriate.

Exodus of White Students as a Proper Criterion for Planning

Plaintiffs argue that the School Board bears the burden of proving that the Proposed Plan can survive strict scrutiny under the Equal Protection Clause because the Board allegedly employed racial criteria in designing the Proposed Plan. Specifically, plaintiffs claim that the Proposed Plan is suspect because it was developed in part, to stem white flight and because it has the effect of creating twelve racially identifiable black schools. The plaintiffs cite Bakke, 438 U.S. 265 (1978), as support for this proposition.

The short answer to this argument is that the Proposed Plan does not create an impermissible classification. Under the Proposed Plan, the residence of the child will determine the school to which the

child will be assigned. The Proposed Plan seeks to confer the benefit of neighborhood schooling upon all students in the City, and makes it available to all, regardless of race. See, Crawford, 458 U.S. at 537. The case at bar presents a clear instance of state action which addresses race related matters in neutral fashion. As the Supreme Court has stated, "A neighborhood school policy in itself does not offend the Fourteenth Amendment." Id. at 537, n. 15; Swann, 402 U.S. at 28. Thus, on its face, the Proposed Plan does not establish a classification grounded on race. This distinguishes the case at bar from Bakke in which a medical school overtly considered applicants for admission differently according to race or ethnic origin.

Moreover, there is no evidence in this case to indicate that the Board used "residence" as a factor determining which school a child will attend as a pretext for discriminating on the basis of race. While the Board considered race when drawing up the boundary lines of the various attendance zones, it did so to ensure the maximum amount of integration in each school. Thus, it cannot be said that this line-drawing technique suggests that the Proposed Plan invidiously discriminates on the basis of race. And the fact that the Propose Plan increases the number of racially identifiable black schools to twelve does not, standing alone, dictate a finding that an impermissible classification was established. See, Washington v. Davis, 426 U.S. 229. The evidence has failed to show that the Board intended to

use this Proposed Plan as a subterfuge for a deliberate attempt to discriminate on the basis of race.

Plaintiffs further argue that the Board's consideration of "white flight" was improper. This Court has already found that, as a factual matter, the Norfolk school system has been a victim of "white flight". Certainly, the mere fact that the Board considered the problems of white enrollment loss does not indicate that the Board acted with a discriminatory purpose when it adopted the Proposed Plan.

There is nothing inherently suspect in the Board's consideration of the "white flight" problem in 1983. As noted above, it is established that the possibility of white flight cannot justify a school board's failure to comply with court-ordered desegregation, nor would it excuse actions which would tend to make

the court order unworkable, Scotland Neck Board of Education, 407 U.S. 484; Davis, 721 F.2d 1425. However, those cases are distinguishable from the one at bar because the school board in each of those cases was under court order to dismantle a dual school system. In Norfolk, by contrast, the school system was declared unitary in 1975 and the Board's continuing, affirmative duty to desegregate was discharged at that time. The School Board therefore did not act improperly in 1983 when it took into account the problems of white enrollment loss in considering a pupil assignment plan to ensure that the Norfolk school system would remain integrated over the long term. See, Ambach, 598 F.2d 705; Higgins, 508 F.2d 779. As the Sixth Circuit stated,

> ... It does not follow that a board must ignore the probability of white flight in attempting to formulate a voluntary plan which would improve

> the racial balance in the schools without at the same time losing the support and acceptance of the public.

Higgins, 508 F.2d at 794 (emphasis in original).

Parental Involvement and the Proposed Plan

As noted above, plaintiffs have argued that the Proposed Plan was adopted and designed for the purpose of discriminating on the basis of race, and that the Board's stated justifications for adopting the Proposed Plan were mere pretexts. This Court has determined that the primary objective of the Board in adopting the Proposed Plan -- providing a response to the threat posed by white flight to the long term integration of the Norfolk school system -- was not a pretext for discrimination. This Court also finds that plaintiffs have failed to produce convincing evidence to substantiate their

claim that the School Board's other key objective in adopting the Proposed Plan (i.e., increase the level of parental involvement) was pretextual.

One of the School Board's primary concerns has been the involvement of the parents in the process of education. The evidence produced in this case by both sides is absolutely clear that parental involvement at the elementary school level is essential to the health and well-being of a school system. When asked whether involvement of parents in the school system was desirable, every witness -- sociologists, educators, parents -- responded affirmatively. Dr. Foster, one of plaintiffs' key experts, stated, "... today parental involvement is considered to be one of the most important ingredients for quality education." Tr. at 189. Dr. Albert Ayars, who served as Superintendent

of the Norfolk school system until about a year ago, testified that parental involvement was "vital". Dr. Ayars pointed out that a nationwide Gallup Poll conducted in 1976 revealed that 65% of those responding believed that the "most significant factor" in a child's education was the involvement of parents.

While plaintiffs' acknowledged that parental involvement was important in making a school system successful, they attempted to defend the extent of parental involvement under the present plan. Plaintiffs also tried to intimate that programs to increase parental involvement which are to be implemented in connection with the Proposed Plan could work equally well under the current plan. These efforts fell short. Dr. Ayars, who was particularly well qualified to make such an assessment, stated that crosstown busing had "virtual-

ly destroyed" the PTA in Norfolk. PTA membership has fallen from approximately 15,000-20,000 to a mere 3,500. Dr. Ayars testified that, during his tenure, the school administration engaged in extensive efforts to improve the level of parental involvement and to increase the number of PTA members. One such effort was to offer free transportation to parents to enable them to attend meetings at their children's schools which were across town. However, these efforts were all to no avail.

At trial, individual parents testified that they lacked the transportation, and in many instances the energy, to make the trips to distant schools. These parents also testified, as did Dr. Ayars, conversely, that their interest and involvement would be revived if their children attended an elementary school in the neighborhood.

In short, this Court finds as a factual matter that the Norfolk School Board faced a critical problem caused by the precipitous decline in the level of parental involvement as a result of crosstown busing. Further, this Court has determined that the Proposed Plan constitutes a reasonable solution developed by the School Board to the difficult problem of declining parental involvement. Therefore, contrary to plaintiffs' argument, there is insufficient evidence from which to conclude that this objective of the School Board was, in fact, a pretext for discriminating on the basis of race.

No Alternative Plan

The School Board commissioned Dr. McLaulin to devise another plan as an alternative to the Proposed Plan which divides the City into attendance zones. The purpose of this alternative plan was

to determine whether it would be feasible to retain a system of crosstown busing but at the same time to reduce the amount of time a child would spend on a bus each day. (The evidence proffered here showed that many children spend as much as 45 minutes on a bus traveling just one way to school.) This alternative plan was presented to the community at a series of public hearings held to aid the School Board in its decision-making process. The public was fully informed as to the principle underlying the alternative plan and as to the actual design of the alternative plan. However, the evidence produced in this case clearly established that absolutely no interest was expressed at the public hearings in the alternative plan. Therefore, the alternative plan was appropriately shelved. In short, this Court finds that the alternative plan was never

a viable program and plaintiffs' arguments to the contrary, as well as their attempts to question the consideration which the alternative plan received, are completely unavailing.

The Board's Procedures

Plaintiffs have argued that the procedures used by the Board to consider and adopt the Proposed Plan were suspicious. Plaintiffs further contend that the suspicious nature of this process suggests that the Board acted with discriminatory purpose.

The Court finds, however, that the School Board's decision-making procedures were reasonable and do not indicate that the Board acted with discriminatory intent. There is no evidence of clandestine action on the part of the Board, or even the hint that any took place. Indeed, the facts are to the contrary. The Board

established a special committee, the Ad Hoc Committee, to investigate the matter; later, a committee of the whole Board considered the matter. The Board solicited studies and opinions from further experts (Doctors Green, Edmonds, Lightfoot, Armor) as to various problems facing the school system and as to possible solutions. The Board held a series of six public hearings at different sites throughout the City during which the comments of the community were sought and received. The Board requested the opinions and advice of Dr. Ayars and Dr. Carter as well as those of their staffs. Plaintiffs' criticisms, made with the clear vision of hindsight, amount to no more than a claim that the Board failed to meet a standard of near-perfection in its decision-making process. In short, plaintiffs' criticisms of the Board's procedures do not, considered sep-

arately or in combination, lead to the conclusion or even amount to a suggestion that the Board was in fact acting with an intent to discriminate on the basis of race.

Housing

Plaintiffs have argued that those neighborhood schools which would be racially identifiable as black under the Proposed Plan are those schools which are located in housing projects or areas of subsidized housing, and that therefore the official actions of the housing authorities have, in large part, determined where the children of the residents of those projects will attend school. However, plaintiffs' argument does not lead to a finding that the School Board has acted with discriminatory purpose in the adoption and design of the Proposed Plan.

All of the evidence points out that the slum clearance projects undertaken by the Norfolk Redevelopment and Housing Authority ("NRHA"), and any other agency involved with housing, beginning in the 1950's did, in fact, eliminate areas which were truly slums. The abominable living conditions in those slums were made even worse by the crowding of several families into units designed for single family habitation. These slum areas were occupied by those on the lowest rung of the economic ladder, many of whom were black. Therefore when the slums were cleared, most of those who were displaced were black. The cleared slum areas became the sites of modern housing projects which were, by law, intended to house low income families; space in those projects was,

again by law, to be offered first to those who had been displaced by the demolition of the slum areas.

Today, Norfolk's fifteen public housing projects and seven subsidized housing projects are occupied almost exclusively by black residents. These projects house approximately 25% of Norfolk's black families and, by deduction, 25% of Norfolk's black school children. However, it defies logic to suggest that because the City of Norfolk and the appropriate City agencies had undertaken an aggressive and progressive plan to eradicate unlivable slums and to replace them with modern, affordable living spaces for low income residents, the School Board is responsible in some way for the fact that under the Proposed Plan, the racially identifiable black schools are located in close proximity to those projects. No plaintiff expert wit-

ness suggested that the School Board should have insisted to the City, or to the appropriate City agencies (e.g., the NRHA), that the statutory requirement that those displaced have priority in the assignment of rental units be ignored, that some of the units be made available to those of greater financial means, that the long waiting lists of prospective black tenants (which exist even today) be disregarded or that some of the new accommodations be set aside and held, even if unoccupied, for white residents only. As Justice Powell wrote in Columbus Board of Education v. Penick,

> There are unintegrated schools in every major urban area in the country that contain a substantial minority population. This condition results primarily from familiar segregated housing patterns, which -- in turn -- are caused by social, economic, and demographic forces for which no school board is responsible....

443 U.S. 449, 480 (1979); Cf., Bell v. Board of Education, Akron Public Schools, 683 F.2d 963 (6th Cir. 1982) (discrimination in housing by governmental agencies not imputable to school authorities otherwise innocent of segregative intent). And as Professor Alexander Bickel stated, in a passage quoted by the Court in Penick,

> In most of the larger urban areas, demographic conditions are such that no policy that a court can order, and a school board, a city or even a state has the capability to put into effect, will in fact result in the foreseeable future in racially balanced public schools. Only a reordering of this environment involving economic and social policy on the broadest conceivable front might have an appreciable impact.

Id., at 480.

The focus of the school desegregation cases has been upon the elimination of dual school systems. As Chief Justice Burger stated in Swann,

> We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from Brown I to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objection of Brown I to seek to use the school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination.

402 U.S. at 22-23.

Conclusion

Briefly stated, this Court holds as follows:

1. The 1975 Order entered in Beckett is to be given full force and effect. It was signed four years after this Court ordered crosstown busing, and after this

Court had overseen the operation of the school system for four years. The Order was entered only after due reflection and consideration by this Court. And it is clear, moreover, that the school system displays the various indicia of a unitary system.

2. As a result of the proper findings made in the 1975 Order, that the School Board has satisfied its affirmative duty to desegregate and that the system is unitary, the plaintiffs in this action bear the burden of proof. Plaintiffs must show that the School Board's actions in adopting the Proposed Plan were taken with an intent to discriminate on the basis of race.

3. It is clear to this Court that plaintiffs have failed to sustain their burden. The School Board had two principal reasons for adopting the Proposed Plan

--to try to meet the threat posed by white flight to the integration of the school system over the long term and to attempt to increase the level of parental involvement. The Court finds that there is a factual basis for the School Board's concerns, that the solution proposed by the Board is a reasonable one and was a result of reasoned consideration, and further that the Board's stated justifications for adopting the Proposed Plan were not pretextual. In addition, this Court finds that the Board's procedures in adopting the Proposed Plan were not flawed in any manner which might indicate that the Board was acting with discriminatory purpose.

4. Plaintiffs have attempted to link the actions of the School Board with those of the Norfolk housing agencies for the purpose of establishing that the

School Board acted improperly in designing and adopting the Proposed Plan. This Court concludes, for the reasons stated above, that plaintiffs' argument on this point must also fail.

5. Plaintiffs' motion to set aside the Order of February 14, 1975 in Beckett v. School Board of the City of Norfolk is DENIED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
July 9th, 1984.

Filed July 9, 1984

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

PAUL R. RIDDICK, ET AL.,

Plaintiffs

v.

CIVIL ACTION
NO. 83-326-N

SCHOOL BOARD OF THE
CITY OF NORFOLK, ET AL.,

Defendants

ORDER

In accordance with a Memorandum Opinion this day filed, this Court finds.

1. That the Pupil Assignment Plan adopted by the School Board of the City of Norfolk on February 2, 1983, is not unconstitutional;

2. That the prayer of plaintiffs for injunctive relief is DENIED; and

3. Plaintiffs' motion to set aside the Order of February 14, 1975 in Beckett v. School Board of the City of Norfolk is DENIED.

It is so ORDERED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
July 9th, 1984.

Filed Feb. 6, 1986

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1815

Paul R. Riddick, Jr., and Phelicia Riddick, infants, by Paul R. Riddick, their father and next friend,

Cynthia C. Perebee, Johnny Perebee, Gary Perebee, and Wilbert Perebee, infants, by Rev. Luther M. Perebee, their father and next friend,

Anita Fleming, infant, by Blanche Fleming, her mother and next friend,

Darrell McDonald and Carolyn McDonald, infants, by Ramion McDonald, Sr., their father and next friend,

Eric E. Nixon and James L. Nixon, infants, by Patricia Nixon, their mother and next friend,

and

Paul R. Riddick, Rev. Luther M. Perebee, Blanche Fleming, Ramion McDonald, Sr., Patricia Nixon, and Annette Owens,

Appellants

versus

The School Board of the City of Norfolk Thomas G. Johnson, Jr., Dr. John H. Foster, Dr. Lucy R. Wilson, Jean C. Bruce, Cynthia A. Heide, Robert L. Hicks, Hortense R. Wells,

Appellees

The Lawyers' Committee for Civil Rights Under Law,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District

Court appealed from, in this cause, be and the same is hereby affirmed.

/s/John M. Greacen
CLERK

Filed March 19, 1986

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1815

Paul R. Riddick, Jr., et al.,

Appellants,

versus

The School Board of the City of Norfolk, et al.,

Appellees.

O R D E R

We have considered appellants' motion to supplement the record and are of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the motion to supplement the record shall be, and it hereby is, denied.

There having been no request for a poll of the court, it is accordingly **ADJUDGED** and **ORDERED** that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly **ADJUDGED** and **ORDERED** that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Sprouse and Judge Ervin.

/s/
For the Court

(3)

DOCKET NO. 85-1962

Supreme Court, U.S.
FILED
JUN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1985

PAUL R. RIDDICK, JR., et al.,

Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF NORFOLK, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 85-1962

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAUL R. RIDDICK, JR., et al.,

Petitioners,

v.

THE SCHOOL BOARD OF THE
CITY OF NORFOLK, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION
FOR CERTIORRARI

STATEMENT OF THE CASE

The District Court and the Court of Appeals determined that the Norfolk Public School System is unitary and had been so for a number of years. The District Court found as a matter of fact that there was no intent to discriminate

in the School Board's adoption of a Neighborhood Elementary Schools Plan, and the Court of Appeals affirmed this finding. Both courts below found the plan constitutional.

Petitioners brought this action in the United States District Court for the Eastern District of Virginia in 1983 contending that the School Board's Proposal for a Voluntary Stably Desegregated School System denied them equal protection of laws. This proposal, sometimes called the Neighborhood Elementary Schools Plan, was referred to in the District Court as the Proposed Plan. Petitioners sought an injunction against implementation of the Proposed Plan and a declaration that the Proposed Plan is unconstitutional. They also moved the

District Court to set aside the Order entered February 14, 1975, by which the Norfolk Public School System was declared unitary after 19 years of desegregation litigation (the Beckett case).

After fifteen days of trial and full briefing of the issues, the District Court found the Proposed Plan constitutional, denied petitioners' prayer for injunctive relief, and denied their motion to set aside the February 14, 1975 Order, all by opinion and order dated July 9, 1984. The District Court's ruling was affirmed in all respects, without dissent, by a panel of the Court of Appeals for the Fourth Circuit on February 6, 1986. A petition for rehearing en banc and motion to supplement the record[1/] were denied on

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1/ Respondents have opposed petitioners' motions to supplement the

Footnote Continued on Next Page

March 19, 1986.

Three of the seven School Board members herein are black. The schools are administered by a black superintendent. Two of three regional assistant superintendents were black at the time of trial. Between 40 and 50 percent of principals and teachers are black.

The District Court found that the Norfolk School System is unitary and that it had, pursuant to earlier order, been unitary since at least February 14, 1975. The Court found that the School Board's stated reasons for adopting the Proposed Plan were legitimate and were

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Footnote Cont'd.

> record with more recent enrollment figures not because the figures are inaccurate but because the figures by themselves do not prove anything.

not pretexts for discrimination and that the petitioners had failed to prove that the School Board acted with discriminatory intent.

The petitioners' description of the Beckett/Brewer case between 1956 and 1975 is substantially accurate. However, petitioners' suggestion that the February 14, 1975 Order by which the system was declared unitary was a mere consent Order was rejected as a matter of fact by the District Court, which said

> This Court finds that its Order of February 14, 1975 was carefully considered for every phrase it contained. The Order manifested this Court's determination that, as a factual matter, the Norfolk system was free of discrimination and was unitary in 1975.

627 F.Supp. at 819-20, Appendix at 115A-16A. The District Judge below, the

Honorable John A. MacKenzie, was the same judge who, in the Beckett case, entered the order of February 14, 1975, and to whose docket the Beckett case had been assigned since July 7, 1971. 627 F.Supp. at 816, Appendix at 101A.

Petitioners suggest that Dr. Armor's predictions that the Proposed Plan would increase white enrollment rested solely on a finding in a public opinion poll that white parents were not opposed to schools that were fifty percent or more white. This suggestion ignores the multiple factors in Armor's report by narrowing attention to a single question out of the more than one hundred questions asked and does so completely out of context. The primary focus of the opinion survey, which was but one part of underlying data and

analysis used in Dr. Armor's projections, was mandatory busing. The survey was a detailed and professional public opinion poll, composed of over one hundred questions, of which only one is related in the petitioners' brief. The predictions in the Armor report (Ex. 43, R. 755) are clearly based not upon the response to a single question but upon a multitude of considerations including these: an analysis of past and present enrollment; a review of historic and present demographics; an analysis of individual school enrollment and demographics; an analysis of enrollment in the only other system which initiated and then stopped mandatory busing; enrollment projections based upon the cohort retention method, a statistical sociological method for projecting

enrollment; consideration of where those students who left the system and who elected not to enter the system may have gone; and community reaction to the system and to the quality of education in the system and to proposed changes in mandatory busing.

Petitioners' description of the Proposed Plan omits consideration of the Majority-Minority transfer program and the impact of that program on the enrollment figures in the elementary schools. That realistic and workable program allows any student enrolled in a school over 70% of his or her race, at the parents' option, to transfer to a school in which his or her race is in the minority. After taking into consideration the expected number of Majority-Minority transfers, the School

Administration projected that in the Fall of 1984 the enrollment at Bay View Elementary School would be 25% black, rather than 15.1% black as indicated at page 19 of the Petition. Bay View was projected to have the proportionally largest white enrollment. No other school was projected to have enrollment over 70% white after the Majority-Minority transfers were accommodated. Of the 14 majority white schools condemned by petitioners, only five were projected to have enrollments over 60% white.2/

2/ For reasons unexplained, petitioners rely on the proposed enrollment figures for Fall of 1983. By the time this case was tried, in February 1984, projections for Fall 1984 were available and were introduced in evidence before the District Court. Ex. 1D, R. 707-08.

Petitioners' discussion of the Plan also omits reference to several important aspects of the Plan which do not relate directly to busing. First, the Plan includes a multicultural program "designed to provide contacts between students of different races, thus offsetting any possible racial isolation of students in a predominately one race school." Ex. 1, R. 301. See also Ex. 4. The Plan includes a parental involvement program designed to increase the participation of parents in the educational system. Parental participation in the system was found below to have been substantially harmed by the busing plans. For example, the Parent Teachers Association (PTA) had been "virtually destroyed" by crosstown busing. 627 F.Supp. at 824.

The Plan also includes the filing of an annual accounting with the United States Magistrate for the United States District Court for the Eastern District of Virginia to report upon the allocation of resources within the School System and to provide an opportunity for those who are dissatisfied to present their complaints to the Magistrate. This step was taken in order to assuage the fears of those who might believe that, despite the major participation by blacks in the administration of the School System, predominately black schools could be short-changed in resources. The District Court and the Court of Appeals looked with favor on this feature of the Plan.

Finally, the School Board resolved in 1983 that the Plan would not be

implemented without the approval of the United States District Court for the Eastern District of Virginia. The City Attorney was directed to takes steps to bring the Proposed Plan before the Court, and such steps were initiated. The legal proceedings instituted on behalf of the School Board were withdrawn after the filing of petitioners' Complaint in this case.

SUMMARY OF ARGUMENT

The decisions below do not permit "immediate resegregation" of Southern schools as contended by petitioners. The School Board of the City of Norfolk acted not "immediately" but only after the Norfolk system had been unitary for years, enough time for nearly two generations of students to pass through the elementary schools. The Proposed Plan

does not "resegregate" anything. It eliminates crosstown busing for elementary school students, but it retains voluntarily many other desegregation remedies, including crosstown busing of middle school and high school students, multicultural programs, and drawing of elementary attendance zones in a way to maximize integration. In the face of this and of the District Court's findings of fact that the Board acted for good reasons and without discriminatory intent, petitioners cannot seriously contend that school boards everywhere can, in reliance on the decisions below, immediately on achieving unitary status "resegregate" the schools.

The focus of this Court's attention in school cases has been the dual school system, how it manifested itself and how

it was to be eradicated. In Norfolk the dual system was eradicated, and the system became unitary. The District Court so found in 1975 and reiterated that finding in 1984. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), is this Court's leading decision on the use of crosstown busing as a desegregation remedy. This Court made clear in Swann that busing was a remedy to be used in the interim transitional period while the dual system was being converted to a unitary system. The principle that busing, pairing and zoning are temporary remedies permeates the Swann opinion, and Swann clearly foretold that the day would come when the remedies would be laid aside because they had worked their cure. So it was in Norfolk, and the

decisions below are consistent with Swann and the other decisions of this Court.

The courts below properly found no discriminatory intent on the part of the School Board. Petitioners say that the impact--ten predominately black schools--taken together with the Board's consideration of white flight, demonstrates a constitutional violation.

This Court has always said that neighborhood schools, even where they involve de facto segregation, are constitutional absent intentional discrimination. The consideration of white flight and its potential, in fact, to resegregate the system is not discriminatory. The District Court found, under the facts in this case, that the School Board considered white flight in the

proper context as part of its effort to maintain integration in the system. Petitioners wish to promote integration, but they fail to demonstrate how integration can be pursued without considering the racial proportions of the system and without implementing measures designed to preserve systemwide racial balance.

Because the Norfolk system is unitary, the decisions below are consistent with Swann. The District Court applied the proper standards in evaluating the proofs and found as a fact no discriminatory intent in the Board's actions. Thus, the courts below properly held the Proposed Plan constitutional.

ARGUMENT

I. THIS CASE, DECIDED ON FACTS EXPRESSLY APPLICABLE TO THE NORFOLK SCHOOL SYSTEM, DOES NOT HAVE THE SWEEPING NATIONAL IMPACT PETITIONERS WOULD GIVE IT.

Petitioners say that the holdings of the courts below will have a sweeping impact since in every past, present and future school desegregation case the system will eventually become unitary as defined in the holdings of this Court. There is no novelty to the idea that a system should and will become unitary. It is fervently to be hoped that school desegregation cases, like all other litigation, will eventually come to an end. This Court has often and consistently said that the goal in school desegregation cases is a unitary school system. Green v. School Board of New Kent County, 391 U.S. 430, 436 (1968); Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964); Brown v. Board of Education, 349 U.S. 294 (1955) (Brown II). "Our objective in dealing

with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race." Swann, 402 U.S. at 23. This Court has always said that the job of the federal courts ended when the system became unitary. Green, supra; Swann, supra.

Neither is there novelty in the idea that busing, zoning and pairing, remedial tools to be used in the interim transition period between the unconstitutional dual system and the constitutional unitary system may be laid aside when the unitary system is attained. Swann, supra. The Swann Court itself said nothing less. It called these measures remedies, it expressed the hope that court intervention would cease upon

achievement of a unitary system, and it reminded us that school desegregation remedies cannot be made to carry too much baggage and cannot be used to cure all society's ills. Swann plainly contemplates exactly the result reached below.

The distinction between liability and remedy stages of lawsuits is very common in the law. Yet petitioners insist that the courts below erred in refusing to apply remedy standards to proof of liability issues. The trial court applied the proper constitutional tests, as will be discussed in Part III, below, and found the petitioners' proofs wanting.

Petitioners contend that the Court of Appeals has written a charter for the resegregation of schools in the South.

This is plainly untrue, but before showing why, the School Board must state its exception to the terminology used by petitioners here and throughout.

Petitioners since the beginning of this case have referred to "segregated" schools and "resegregation" and have sought to load those terms with every bit of evil connotation that they possibly could carry. Also, they have sought to obscure the distinction between de jure and de facto segregation. Quoting from cases reciting the evils of de jure segregation, they apparently contend that the School Board must eradicate de facto residential segregation in Norfolk.

Racial imbalance, without explanation, has no constitutional significance. This Court has uniformly

condemned de jure segregation, whether imposed by state law, Brown v. Board of Education, 347 U.S. 483 (1954) (Brown I), or by state or local government authorities without sanction of law, Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) (Dayton II); Columbus Board of Education v. Penick, 443 U.S. 449 (1979). This Court, like the School Board, regrets the existence of de facto segregation not caused by school authorities, but it has never held it unconstitutional or forced its eradication by school authorities. Keyes v. School District No. 1, 413 U.S. 189 (1973). The "basic constitutional requirement [is] that the State not discriminate between public school children on the basis of their race." Swann, 402 U.S. at 13. "[T]he differentiating

factor between de jure segregation and so-called de facto segregation to which we referred in Swann is purpose or intent to segregate." Keyes, 413 U.S. at 208.

This Court has condemned "dual" school systems and has said they must be dismantled and supplanted by "unitary" systems. Dual systems are those in which, with intent to discriminate on the basis of race, the school authorities operate one set of schools for whites and another for blacks. Brown I, supra. Unitary systems are those in which, without racial discrimination, there are operated not white schools, not black schools, but "just schools". Green, 391 U.S. at 442.

Focusing on "segregation" as a term which looks to racial proportions--

numbers alone--obscures the constitutional inquiry, which is whether racial discrimination plays a part in the operation of the school system.

The Court of Appeals' decision does not provide a charter for "resegregation of schools in the South." Systems which have not become unitary will have no benefit from the Court of Appeals' decision, and systems which have become unitary will be subject to the same scrutiny employed below--the courts will prevent their acting with intent to discriminate. A system which satisfies the court that it has eliminated discrimination and remained unitary for a substantial period of time should, without discriminatory intent, be entitled to shed remedies which are no longer needed. This is not "resegregation."

This Court's cases do not teach that unitariness is a physical construct of court-ordered remedies that must fall if one of the remedies is removed. A unitary system is a system of schools, administered without discrimination, that are just schools with none set aside for children of one race or another and with no child either compelled or forbidden on account of his race to attend a particular school. When this is achieved, as in Norfolk, no child has less than a full opportunity to receive the education to which he is entitled without being stigmatized by a label of inferiority. Busing is not needed to preserve the unitary system. Racial balance has not been the goal of this Court's school desegregation decisions. The objective has been schools from

which no child is excluded on the basis of race. Swann, supra. That objective has long since been accomplished in Norfolk.

Petitioners also say that this case will allow school systems which become unitary "immediately" to abandon desegregation and contend that Norfolk did so "promptly" after being declared unitary. This is simply not so. Nine years had elapsed between the unitary order and the trial. The District Court noted that the busing and pairing plan in effect in 1975 "had been unaltered in any appreciable respect since July, 1971, and . . . has remained essentially unaltered into 1984." 627 F.Supp. at 819. As petitioners note, busing continued pending appeal through the 1985-1986 school year. At the time the Board

adopted the Proposed Plan, busing had been in effect for twelve years, and the system had been declared unitary eight years before. Nearly two full generations of elementary school students had passed through the system in those years. No child presently in the Norfolk school system has ever attended segregated schools in Norfolk. The Board's action was neither "immediate" nor "prompt". The Court of Appeals' decision does not authorize or encourage "immediate" action of any kind.

Respondents have not, in any event, "abandoned" desegregation. They have curtailed busing, and that only for elementary school students (grades K-6 at trial, now grades K-5). Busing and racial balancing continues for middle schools and high schools. Multicultural

programs and annual accountability to the United States Magistrate ensure that students in the ten predominantly black schools will not be deprived of equal educational opportunity. And, as the District Court and Court of Appeals noted, the neighborhood school attendance zones are drawn in order to maximize integration. The petitioners contend that all this is sham and pretext, contrary to factual findings of the District Court. Petitioners even refuse to give the School Board credit for the way in which it has drawn the attendance zones, criticizing the Board because the zones do not follow the lines of historical or cultural neighborhoods.

Petitioners say that the decision below will result in a flood of litigation. First, they say that school

authorities everywhere will attempt to "emulate" Norfolk and that they will be sued for it. The decision below makes clear that the fact by itself that some schools in the unitary system will enroll mostly black students will not result in loss of unitary status. Petitioners made no serious effort below to prove any actual discrimination. Their case rests on enrollment statistics, and the Court of Appeals, following the precedents in this Court, has said that is not enough viewed in light of Norfolk's continued operation of a unitary system and the School Board's dedication to maintaining a stably desegregated system and its ability to do so. Thus, lawsuits against other unitary school systems should arise only where there is evidence of discrimination.

Second, petitioners say that the holdings below will cause lawyers who represent plaintiffs "to resist the closure of all school cases, and any acknowledgement that a district is 'unitary', as long as possible". Petition, page 39. Of course, lawyers are obliged to contest a finding of unitariness if they have reason to doubt its accuracy, and the district courts are charged with retaining jurisdiction until they are sure the systems are unitary. Green, supra. But to resist where discrimination has been eliminated would be grossly irresponsible. That some may do so cannot justify invasion of the rights of the school authorities, in whose hands, absent discrimination, this Court has said administration of the schools should be.

Petitioners say that Norfolk has returned to the conditions condemned in Monroe v. Board of Commissioners, 391 U.S. 450 (1968). This is not 1968, and much has passed since then, including a finding in Norfolk that the school system is unitary and that discrimination had been eliminated from it. That was over ten years ago, when none of the present respondents sat on the School Board. Three of the respondents here charged with racial discrimination are black. The superintendent and two of three regional assistant superintendents are black. Faculties are integrated. To accept petitioners' argument is to say that busing must go on virtually forever. This Court has never said that. The result reached below was clearly foretold in Swann. There is no

reason for this Court to disturb the Court of Appeals' decision or the District Court's findings of fact.

Petitioners have failed to demonstrate how this case comes within this Court's Rule 17.

II. BY BECOMING UNITARY, THE NORFOLK SCHOOL SYSTEM DISCHARGED THE DUTY TO ELIMINATE THE PREVIOUS DUAL SYSTEM, AND ITS ADOPTION OF THE NEIGHBORHOOD ELEMENTARY SCHOOLS PLAN AS APPROVED BY THE COURTS BELOW IS NOT INCONSISTENT WITH THIS COURT'S DECISIONS.

Petitioners contend that the decisions below are inconsistent with this Court's holding in Swann. Swann dealt with what remedies could be imposed by the courts to hasten the eradication of dual school systems. On practically every page of this Court's opinion in Swann appears the word "remedy", and the

Court made clear that these remedies were to be imposed during the interim transitional period during which the dual system was converted to a unitary system. Any reference to Swann which implies that it sets standards of proof of discrimination overlooks the fundamental remedial nature of Swann. The decisions below conflict not at all with Swann.

Dual school systems must be dismantled by affirmative steps and replaced with unitary systems. Brown I, supra; Green, supra. School authorities who cannot show that they have disestablished their dual system are subject to court-mandated disestablishment. Columbus, supra. "In seeking to define . . . how far this remedial power extends it is important to remember that

judicial powers may be exercised only on the basis of a constitutional violation." Swann, 402 U.S. at 16. The Norfolk dual system was disestablished, the system became unitary, and the District Court found it so. Having satisfied its duty to dismantle the dual system, the School Board is no longer liable to claims that it has failed to do so and is no longer obliged to take artificial action to preserve racial balance in the schools. "Dismantling" the dual school system was contemplated by this Court to be a "process" which is at some time "completed." Wright v. Council of City of Emporia, 407 U.S. 451, 452, 470 (1972). "And even where there have been segregated schools, once desegregation has been accomplished no further constitutional duty exists upon

school boards or States to maintain integration." Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 492 (1982) (Powell, J., dissenting).

A neighborhood school system which results in racial imbalance is not unconstitutional unless it results from intentional discrimination. Crawford v. Los Angeles Board of Education, 458 U.S. 527, 537 n.15 (1982); Columbus, supra; Keyes, supra.

The District Court found, as a fact, (as was found by the Beckett court in 1969, see 784 F.2d at 543 and n.20, Appendix at 94A) that the School Board was not responsible for residential patterns, and this finding was affirmed by the Court of Appeals. The public housing projects, which petitioners wrongly label "ghettos", are open to all

eligible tenants regardless of race. No one is forced to live in them because of his race. The evidence at trial, even that of petitioners' experts, showed that Norfolk is basically a residentially well-integrated city, as is reflected in the Board's ability to draw attendance zones for 25 substantially integrated elementary schools. Official barriers to blacks wishing to live in formerly all white neighborhoods have fallen. But busing did not cause these barriers to fall, and busing will not eliminate the remaining predominantly black residential areas.

Petitioners argue that Swann places the burden on the School Board to show that it has not discriminated in adopting a neighborhood schools plan. Swann holds that, where a dual system

exists, the burden is on the school authorities to show why one-race schools remain in a remedial plan. The instant case does not involve a remedial plan but involves the question whether the School Board has discriminated. Swann does not shift the burden of proving liability and is, therefore, inapposite on that issue.

The inapplicability of Swann to unitary systems is clear from its own language. "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. . . . The remedy for such [deliberate] segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be

avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." 402 U.S. at 28 [emphasis added].

Petitioners contend that Columbus, supra, and Dayton II, supra, impose a continuing duty on respondents to disestablish the dual school system. Neither case imposes any obligation after the dual system is disestablished, and neither involved a system which had become unitary. "The Board has never seriously contended that it fulfilled its affirmative duty or the heavy burden of explaining its failure to do so." Dayton II, 443 U.S. at 538-39. "The Board's continuing 'affirmative duty to disestablish the dual school system' is therefore beyond question, . . . and it has pointed to nothing in the record

persuading us that at the time of trial the dual school system and its effects had been disestablished." Columbus, 443 U.S. at 460-61 [citation omitted].

"[T]he measure of the post-Brown I conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." Dayton II, 443 U.S. at 539 [emphasis added]. When the system becomes unitary, its future actions should be judged by their purpose, not by their impact.

"[I]n the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process." Washington v. Seattle

School Dist. No. 1, 458 U.S. 457, 474 (1982).

Petitioners say that the School Board seeks the "legal right to reestablish the exact situation that the injunction was designed to bring to an end." Petition, page 47. This is untrue. The injunctive relief in the Beckett case was designed to dismantle the dual system, not permanently to sustain artificial racial balance in the schools.

Petitioners argue that the neighborhood school plan is an effort to "re-establish" the dual system in violation of Swann, Dayton II and Columbus. Those cases suggest that the district court use care to prevent such re-establishment in the course of the court's supervision of the dismantling

of the dual system. This case is not at such a remedial stage. However, if the Norfolk School Board did seek actually to re-establish the dual school system, such would be a constitutional violation. To ask whether the neighborhood school plan is a vehicle for the re-establishment of the dual system is simply to restate the primary issue in this case, that is, whether the neighborhood school plan was adopted for the purpose of discriminating against black children. That the Proposed Plan includes schools with predominantly black enrollments is not "re-establishment" of the dual system unless it is done with invidious discrimination. It was up to the petitioners to prove such discrimination, and they could not do so.

The schools in Norfolk under the Proposed Plan will not be "highly segregated by race," unlike the schools in Dayton II and Columbus. See Dayton II, 443 U.S. at 529; Columbus, 443 U.S. at 452. In Columbus, "70% of all students attended schools that were at least 80% black or 80% white." Id. In Dayton, 51 of 69 schools in the system were virtually all white or all black. 443 U.S. at 529. In Norfolk, all middle and high school students will attend schools enrolling substantial numbers of students of all races. In Norfolk, all white elementary students and approximately 65% of black elementary students will attend schools enrolling substantial numbers of students of all races, given the effect of Majority-Minority transfers.

Even if statistics were the sole touchstone of discrimination in schools, Norfolk is not a "dual sytem". There is no system of schools for white students. All white students will attend integrated schools. And there is no system of schools for black students. The vast majority of black students will attend integrated schools. Approximately 35% of black elementary students will attend ten predominantly black schools. No black child will be forced to attend such a school against his parents' will. No child is assigned to such a school because of his race.

Busing is a remedial measure that is not an end in itself. The 1971 Court-ordered busing plan in Norfolk resulted from this Court's decision in Swann, wherein the Court recognized that

if there were no discrimination, "it might well be desirable to assign pupils to schools nearest their homes" and that busing might be administratively awkward or inconvenient, "but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems", id. at 28 [emphasis added]; that "at some point, these school authorities and others like them should have achieved full compliance with this Court's decision in Brown I. The systems would then be 'unitary' in the sense required by our decisions," Id. at 31.

The courts below correctly held that Swann's presumption against one-race schools did not apply to the unitary school system in Norfolk.

III. THE COURTS BELOW APPLIED THE PROPER STANDARDS OF PROOF OF DISCRIMINATORY INTENT.

Petitioners suggest that the impact of the Board's action, taken together with the purpose to create schools acceptable to white parents, proves discrimination. Petitioners argue that the Proposed Plan is based on "racial criteria" and is "as deliberate a segregation policy as any ever encountered." Petition, page 55. This contention rests solely on two facts: that the proposed Plan creates a number of predominantly-black schools and that the School Board considered "white flight" in making its decision.

Petitioners' contentions that the School Board does not believe integration is worthwhile and that it adopted the Plan in order to create a refuge

for white students constitute a blatant distortion of the facts and of the findings of the courts below. It was precisely because it wished to preserve integration that the Board concerned itself with white flight.

Based on Dr. Armor's 1983 and 1984 projections, the Board was justified in believing that continuation of busing would eventually lead to the schools' becoming 75% or more black systemwide. Eventually the system would become so heavily black that no meaningful degree of integration could be maintained, as has happened in other cities. Perceiving integration to be a social good, the Board acted to stem white flight. Petitioners in their own right also insist that the system should be integrated, but they suggest no way in

which that can be achieved without consideration of the races of the children. Cf. McDaniel v. Barresi, 402 U.S. 39 (1971).

The petitioners argue that the premise of the Plan was to create majority white schools which were favored by white parents. This is totally unfounded. As already noted the Armor public opinion questionnaire dealt with mandatory busing and not racial proportion. Only one question related to racial proportion, and it reflected only the fact that whites in the system and outside of it would prefer schools which were not made up primarily of blacks, had no objection to schools that were fifty percent of one race and the other, and oppose schools that were solely of one race. Indeed, an analysis of the

enrollment in 1983-84 at the time of the trial, compared with the enrollment projected in the plan, including the Majority-Minority transfers, indicates there were nine schools at the time of the trial which were over fifty percent white. Under the Plan only five additional schools become over fifty percent white, five other schools decrease in the white enrollment. The nine remaining schools, other than the ten petitioners complain of, only change by one to five percentage points. Percentages reflected in the plan are a function of demographics of the neighborhoods from which schools draw, are in no way an effort to create any majority schools, but are quite the opposite. Evidence at the trial was that the School Board drew the attendance zones

to maximize the racial balance in the schools. Nowhere in the evidence was there a suggestion that the School Board was seeking to create schools which were majority white. Rather, the evidence showed that the Board was seeking to create neighborhood schools, maximize parental involvement and hopefully and most importantly maintain the existing racial enrollments in the face of ever-dwindling white enrollment and predictions of its continuance.

Assignment to the schools in predominantly black neighborhoods is based on residence, not race. No black child is required on the basis of his race to attend such a school, and no black child is excluded on the basis of his race from attending a school that happens to be majority white in its enrollment.

"[D]isparate impact and foreseeable consequences, without more, do not establish a constitutional violation." Columbus, 443 U.S. at 464.

To argue that a neighborhood attendance plan which includes schools predominantly black in their enrollment thereby creates a racial classification is nothing more than an argument that a one-race school is proof per se of invidious discrimination. If this were the law, de facto segregation would always require a court-ordered desegregation remedy. It does not. Crawford; Columbus; Keyes. Petitioners' contention that the predominantly black schools are, of themselves, a racial classification is an effort to circumvent these holdings.

Neither is there merit in petitioners' suggestion that consideration of white flight in adopting the Proposed Plan creates a racial classification. Admittedly, a dual system cannot consider white flight as an excuse not to formulate a desegregation remedy, but absent a constitutional violation the effects of white flight may be considered in formulating a voluntary plan. Crawford, infra. The Board's hope that the Plan will stabilize white enrollment in Norfolk's unitary system is not a racial classification.

In Crawford v. Los Angeles Board of Education, 458 U.S. 527 (1982), California amended its constitution to prohibit its courts from ordering busing in cases where the Fourteenth Amendment did not require it, abolishing

court-ordered busing as a state law remedy for de facto school segregation. Analyzing whether the amendment was adopted for discriminatory purposes, this Court included among possible non-discriminatory motives that the "voters also may have considered that the extent of mandatory busing, authorized by state law, actually was aggravating rather than ameliorating the desegregation problem," id. at 543, referring to statistics showing the change in racial composition of the Los Angeles school enrollment, including a drop from 53.6% white in 1968 to 23.7% white in 1980. Id. at 530 n.1.

The Crawford Court explicitly rejected the contention that the amendment created a racial classification, stating "[i]t neither says nor implies

that persons are to be treated differently on account of their race. . . . The benefit it seeks to confer--neighborhood schools--is made available regardless of race." Id. at 537.

The duty of the courts "in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to and did in fact discriminate against minority pupils, teachers, or staff." Dayton Board of Education v. Brinkman, 433 U.S. 406, 520 (1977) (Dayton I).

The trial court properly applied the tests for proof of discrimination set out in Arlington Heights v. Metro.

Housing Corp., 429 U.S. 252 (1977) and Washington v. Davis, 426 U.S. 229 (1976). Petitioners relied below on the description of relevant evidence set forth in Arlington Heights, 429 U.S. at 666-68, these being impact, historical background, sequence of events leading to the decision, and "legislative" history. The District Court found, reviewing that evidence, that discrimination was not proved. The Court of Appeals reviewed and affirmed the District Court's findings, holding that the evidence supported them. This Court should do no more. Petitioners have failed to show why this case should be reviewed here.

CONCLUSION

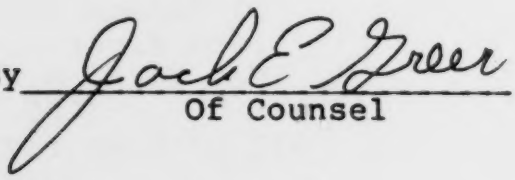
The Norfolk public schools have been unitary for over eleven years. The

School Board has not abandoned desegregation but has simply curtailed crosstown busing of elementary students, partly in the hope that such action will preserve long-term integration of the system. This result follows clearly from Swann, it does not eviscerate Swann, and it does not authorize "resegregation" of schools anywhere. The District Court having applied the proper standards and found no discriminatory intent as a matter of fact, the Court of Appeals acted correctly in affirming its decision. For the reasons set forth herein, the School Board of the City of

Norfolk prays that the Court will deny the petition for certiorari.

Respectfully submitted,

THE SCHOOL BOARD OF THE
CITY OF NORFOLK, et al.

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CERTIFICATE

I certify that on this 27th day of June, 1986, three copies of the foregoing were mailed, postage prepaid, to:

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All parties required to be served have been served.

Jack E. Greer

MOTION FILED
JUN 27 1986

No. 85-1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAUL R. RIDDICK, JR., *et al.*,

Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF NORFOLK, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NAACP SPECIAL CONTRIBUTION FUND, THE AMERICAN CIVIL LIBERTIES UNION AND THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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IN THE

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October Term, 1985

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PAUL R. RIDDICK, JR., *et al.*,

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THE SCHOOL BOARD OF THE CITY OF NORFOLK, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Introduction

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), NAACP Special Contribution Fund, American Civil Liberties Union ("ACLU"), and the Mexican-American Legal Defense and Educational Fund ("MALDEF"), hereby respectfully move this Court for leave to file the attached brief as *amici curiae,* in support of the Petition for Writ of Certiorari pursuant to Rule 36.1 of this Court's Rules. The brief *amici curiae* is being conditionally filed with this motion, copies of which have been served upon all parties. The written consent of the petitioners is on file with the Clerk. Respondents have refused their consent.

Reasons for Granting the Motion

All of the above-named movants have a long history of direct support for, and participation in, cases furthering

school desegregation in this Court and in the courts of appeals. The Lawyers' Committee, organized in 1963 at the request of the President of the United States to assure civil rights to all Americans, has enlisted the services of thousands of members of the private bar in cases involving education (including school desegregation), voting, employment, housing, municipal services, the administration of justice and law enforcement. It has participated in such school desegregation cases as *Board of Education* v. *Harris*, 444 U.S. 130 (1979); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976); *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); and the instant case below, *Riddick* v. *School Board of the City of Norfolk*, 784 F.2d 521 (4th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3811 (U.S. May 30, 1986) (No. 85-1962).

The NAACP Special Contribution Fund, a non-profit membership corporation, was formed in order voluntarily to promote equality of rights and eradicate caste and race prejudice among the citizens of the United States. It has participated in this Court, both as a party and as *amicus curiae*, in cases presenting constitutional and statutory claims of racial discrimination. *E.g.*, *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); *Pasadena City Board of Education* v. *Spangler*, *supra*; *Washington* v. *Davis*, 426 U.S. 229 (1976); *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

The ACLU, a nationwide, non-partisan organization, is dedicated to protecting the fundamental rights of the people of the United States. Among those rights is the equal protection right to a nondiscriminatory, desegregated public education. It has participated in *Crawford* v. *Los Angeles Board of Education*, 458 U.S. 527 (1982); *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979); *Columbus*

Board of Education v. *Penick*, 443 U.S. 449 (1979); and *Pasadena City Board of Education* v. *Spangler*, *supra*.

MALDEF is a national civil rights organization whose principal objective is to secure the civil rights of Hispanics living in the United States. MALDEF has presented significant education issues to this Court in such cases as *Plyler* v. *Doe*, 457 U.S. 202 (1982) and *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973).

Movants have concluded, as this Court has long recognized, that discrimination on the basis of race and the racial segregation of educational facilities are serious impediments to equal educational opportunity. The return to all black schools under Norfolk's Proposed Plan may well be understood throughout the country as a signal to abandon the principles of *Brown*.

Movants are uniquely placed to aid the Court in addressing the questions presented by petitioners. Movants speak on behalf of members of the bar deeply versed in the relevant law and on behalf of preeminent civil rights and civil liberties organizations. More than one hundred cases, including those in which movants are involved or expect to be involved, may be affected by the disposition of *Riddick* in this Court.

Relief Sought

For the foregoing reasons, movants respectfully pray that they be permitted to file the attached brief *amici curiae*.

Dated: New York, New York
June 27, 1986

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1985

No. 85-1962

PAUL R. RIDDICK, JR., *et al.*,

Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF NORFOLK, *et al.*,

Respondents.

BRIEF *AMICI CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NAACP SPECIAL CONTRIBUTION FUND, THE AMERICAN CIVIL LIBERTIES UNION AND THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Interest of *Amici Curiae*

The Lawyers' Committee

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was organized in 1963 at the request of the President of the United States to assure civil rights to all Americans, in particular by affording legal services otherwise unavailable to minorities and the poor pursuing claims for equal treatment under law. The Committee is a non-profit, private corporation, which has enlisted the services of thousands of members of the private bar in cases involving voting, education (including school desegregation), employment, housing, municipal services, the administration of justice and law enforcement.

The Lawyers' Committee has a long history of direct support for, and participation in, cases furthering school desegregation in this Court and in the courts of appeals, including the instant case below. *E.g., Board of Education* v. *Harris*, 444 U.S. 130 (1979); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976); *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); and *Riddick* v. *School Board of the City of Norfolk*, 784 F.2d 521 (4th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3811 (U.S. May 30, 1986) (No. 85-1962).

NAACP Special Contribution Fund

The National Association for the Advancement of Colored People ("NAACP") is a New York non-profit membership corporation. The Special Contribution Fund (the "Fund") is an organization exempt from federal income taxes under 26 U.S.C. § 501(c)(3). The Fund supports legal and educational projects of the NAACP. The NAACP's principal aims and objectives are set forth in its articles of incorporation:

> . . . voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the Courts, education for their children, employment according to their ability, and complete equality before the law.
>
> To ascertain and publish all facts bearing upon these subjects and to take any lawful action thereon, together with any and all things which may lawfully be done by a membership corporation . . .

The NAACP has a long history of participating in this Court, both as a party and as *amicus curiae*, in cases presenting constitutional and statutory claims of racial dis-

crimination. *E.g., Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); *Pasadena City Board of Education* v. *Spangler, supra; Washington* v. *Davis*, 426 U.S. 229 (1976); *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

American Civil Liberties Union

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of more than 250,000 members. The ACLU is dedicated to protecting the fundamental rights of the people of the United States. Among those rights is the equal protection right to a nondiscriminatory, desegregated public education.

The ACLU has a long history of direct representation and *amicus* participation in cases furthering school desegregation before this Court. *E.g., Crawford* v. *Los Angeles Board of Education*, 458 U.S. 527 (1982); *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979); *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979); *Pasadena City Board of Education* v. *Spangler, supra.*

Mexican American Legal Defense and Educational Fund

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1967. Its principal objective, through litigation and education, is to secure the civil rights of Hispanics living in the United States. MALDEF has represented Hispanics in numerous education cases, including twenty desegregation cases brought under the Fourteenth Amendment.

MALDEF has presented significant education issues to this Court in such cases as *Plyler* v. *Doe*, 457 U.S. 202

(1982) and *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973). MALDEF and its local counsel continue to represent Hispanic clients in these cases. The instant case has a direct impact on the interest of Hispanic students in the Houston and Austin, Texas, school districts which have been judicially declared unitary.

Reasons for Granting the Writ

POINT I

This Case Is One of Overwhelming Public Importance.

Amici organizations, each with substantial experience in civil rights and school desegregation cases, have taken the unusual step of presenting their joint views to this Court at the certiorari stage because we are convinced that the *Riddick* decision has enormous significance for school desegregation in particular, and for Fourteenth Amendment jurisprudence in general.

The facts in this case are extraordinary, and the approach taken by the courts below could lead to widespread abandonment of pupil assignment measures which have been implemented in school systems around the country, largely at the prodding of federal courts, to eradicate the effects of generations of segregation and discrimination against racial minorities.

Amici urge that certiorari be granted in order that this Court may determine whether the Fourth Circuit was correct in holding that a school district, now integrated by busing and other affirmative support and thus unitary in that sense, has no further obligation under *Brown* v. *Board of Education*, even though cessation of such affirmative

relief will result in resegregation.* This question and the issues it presents are of the widest importance in American public education, with *Riddick* foreshadowing over one hundred similar cases. The lives and opportunities of too many of the nation's children are at stake to permit the law slowly to evolve through the circuits.

American society has been transformed by this Court's holding in *Brown* v. *Board of Education*, that "in the field of public education the doctrine of 'separate but equal' has no place." 347 U.S. at 495. Generations of school children know firsthand that racial segregation cannot be required nor can racial exclusion be openly condoned.

The opinion below heralds a new doctrinal era, one that casts *Brown* aside and writes an end to school desegregation. The decision does this, and moreover will likely be widely perceived as doing so, because of its explicit holding that the entire body of *Brown* desegregation law is irrelevant. 784 F.2d at 539. Where a desegregation plan is working, that is, producing "unitariness", the Fourth Circuit authorizes the plan's dismantlement. Indeed, the court frees the school board of any further obligation to desegregate. The circuit court thus provides what this Court has long denied, a formula for resegregating school systems throughout the country.**

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* For the purposes of this brief, amici assume that the 1975 Order (see 784 F.2d at 525) *at the time of its entry* dispositively determined that the Norfolk school system was "unitary." We believe, however, that the reasons set forth by the petitioners are decisive for rejecting the claim that the consent order is dispositive of the claims in *Riddick*.

** As petitioners have pointed out, the Department of Justice has already encouraged 164 school districts nationwide to follow the Fourth Circuit formula for disbanding desegregation plans. *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit at 37-38.

The Fourth Circuit's error is evident when the decision is summarized starkly, but not unfairly: Busing is the buttress to Norfolk's unitary school system but, because the system is unitary, the school board has no obligation to continue busing or to implement any other plan to create stable integration. *Brown* is discarded with its purpose yet unrealized and its promise to the ear, now broken to the heart. If *Brown* is dead, this Court should pronounce and explain the obituary.

POINT II

This Court Should Consider Whether the Courts Below Misapplied the Concept of "Unitariness."

A. The Concept of "Unitariness" Is Dynamic; the Adoption of a Static Definition Was Both Erroneous and Insufficient to Erase Decades of Discrimination.

Desegregation in Norfolk began with the 1957 finding of *de jure* discrimination, followed by years of litigation, a court-ordered desegregation plan in 1971 (requiring busing, pairing and clustering of schools), and a 1975 district court finding, after four years of operation under the plan, of "unitariness." * The finding of "unitariness" was reaffirmed by the district court in 1984, relying specifically on the circumstance that no elementary school was "racially identifiable" (627 F. Supp. 814, 819 (E.D. Va. 1984)), a condition brought about and maintained by the very busing that the school board now desires to eliminate.** In the continu-

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* The history of the Norfolk school desegregation litigation is summarized in the Fourth Circuit's decision (784 F.2d at 524-25) and at length in the Petition for Writ of Certiorari at 4-16.

** The desegregation plan of July 28, 1971, utilized a number of integrative techniques with respect to student assignment including

(footnote continued on following page)

ous process of eliminating racial discrimination and its vestiges, the school board now seeks shelter under the finding of "unitariness," with its liberating connotations, to proceed unburdened by any duty to avoid a relapse into segregation, short of explicit intentional discrimination.

Unitariness, however, is not a static concept.* The requirement to achieve unitariness and the correlative duty

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(footnote continued from preceding page)

the grouping and pairing of schools, majority-minority transfers, and crosstown busing to "overcome the remaining vestiges of Norfolk's dual school system." *Riddick,* 627 F. Supp. at 817. The plan was thereafter modified by school authorities to create single zone attendance areas when integrated residential areas developed. The Proposed Plan eliminates the grouping and pairing and creates a contiguous single attendance area for each elementary school, thereby removing critical elements of the plan upon which the finding of unitariness was based.

The Norfolk School Board adopted the Proposed Plan by a vote of 5 to 2. Those board members voting in favor of the Plan included four whites and one black. The two individuals voting against the plan are black. More recently, in 1986, respondents pointed out that the school board, now consisting of three blacks and four whites, voted unanimously to implement the Proposed Plan. Response Opposing Application for Injunction Pending Certiorari at 8, *Riddick, supra.* The approval of certain black members of the school board should not be interpreted to imply general support in Norfolk's black community for the Proposed Plan. Appointments to the board are in the gift of the City Council and not the electorate directly. Moreover, the black community has strongly voiced its opposition to the proposed changes and has maintained its support for a desegregated school system. 4th Cir. App. 823, 2158. (Dr. Armor found that three-fourths of the black parents favor busing to achieve racial balance. His poll data showed that a majority of all Norfolk parents favored the present desegregation plan.)

* *See United States* v. *Swift & Co.,* 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd per curiam,* 367 U.S. 909 (1961), *modified,* 1980-1 Trade Cases (CCH) ¶ 63,185 (N.D. Ill. 1980):

> Having completed this divestiture, the petitioners now seek leave to re-combine, in part upon the ground that divestiture

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to eliminate the continuing effects of past discrimination are obligations enduring as long as necessary to eradicate racial discrimination "root and branch". *Green* v. *County School Board,* 391 U.S. 430, 437-38 (1968). *See Wygant* v. *Jackson Board of Education,* 54 U.S.L.W. 4479, 4482 (U.S. May 19, 1986) (No. 84-1340). The metaphor has meaning only if the regrowth of racially identifiable schools is prevented.

A constitutionally inviolate unitariness cannot be ascribed to a system like Norfolk's which is so unstable that reversion to segregation follows immediately upon the discontinuance of affirmative integration techniques. The elimination of the current desegregation plan, in favor of the school board's Proposed Plan, reinstates the unconstitutional status quo ante. In 1970, the unquestionable vestiges of *de jure* segregation throughout the Norfolk elementary school system were manifested, in part, by the presence of "black" elementary schools, representing 30% of the school system. Pl. Ex. 153. As soon as "neighborhood school" assignment under the Proposed Plan is put into effect, concededly ten of the same formerly identifiable "black" schools will be resurrected, each having more than 95% black enrollment. Pl. Ex. 144, 147. Racially isolated "black" schools will again comprise nearly 30% of the school system. Under the Proposed Plan, resegregation will be the result of an affirmative, willful change, rather than demographic patterns over which the school board has no

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> itself has eliminated the need. As vividly pointed out by counsel for *amici* in oral argument, the principle thus proposed would invite the Standard Oil trust, broken up by Standard Oil Co. of New Jersey v. United States, 1911 . . . now to re-assemble.

189 F. Supp. at 913.

power. This is as offensive to *Brown,* and the prior Norfolk desegregation decrees, as were the *de jure* conditions existing in 1970.

B. This Court Should Consider Whether the Fourth Circuit Abdicated Its Responsibility to Eradicate the Effects of Past Discrimination.

The Fourth Circuit assumed that it could invalidate the Proposed Plan only if there was a new violation. 784 F.2d at 538-39. The court recognized that where, after racial segregation, the transition from a dual to a unitary school system has not been completed, "the board must show that the proposed changes are consistent with its continuing affirmative duty to eliminate discrimination." But the court concluded that once a "unitary finding" has been made, its "role ends," foreclosing its intervention to counteract resegregation. *Id.* at 535.

By limiting its review, thereby halting its analysis, the Fourth Circuit failed to weigh the effects of the board's proposed actions. The board's Proposed Plan *returns* 39% of the black elementary school students to the conditions which prevailed for their predecessors at the time the original *de jure* finding was made in 1957. *Beckett* v. *School Board of the City of Norfolk,* 148 F. Supp. 430 (E.D. Va.), *aff'd,* 246 F.2d 325 (4th Cir.), *cert. denied,* 355 U.S. 855 (1957). This result is contrary to the continuing obligation to eradicate the effects of past discrimination, specified in *Brown* and *Swann.** If school authorities who have administered a *de jure* segregated school system have an affirmative obligation to avoid practices which perpetuate a dual school system while striving to *create* a unitary system, it is indisputable that those same authorities must

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* *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971).

avoid actions which *re-establish* the dual school system by dismembering a unitary one.

C. This Court Should Consider Whether the Fourth Circuit Improperly Required Proof of Intent in a Remedies and Effects Case.

This case is about remedies, not violations. If integration falls apart on withdrawal of the remedies, the violation has not been cured. Under the plan now in force, the remedies effect desegregation. Under the Proposed Plan, the elimination of remedies assures resegregation. The Fourth Circuit failed to see that *Riddick* differs from the predecessor Norfolk school cases which supplied the predicate Fourteenth Amendment violation. School systems throughout the country which are operating under unitary plans need guidance as to remedies, a guidance omitted from the opinion below.

The Fourth Circuit inappropriately likened this case to *Washington* v. *Davis** and *Arlington Heights* v. *Metropolitan Housing Development Corp.*** and held that plaintiffs must prove a new discriminatory intent. In those cases, the question was whether previously unchallenged government action can be unconstitutional merely on the basis of disparate impact and without a showing of discriminatory intent. As this Court pointed out in both cases, a general constitutional right to be free of disparate impact would chill valid and useful government acts to achieve important societal ends.

The relevant analogy for present purposes was, however, *Wright* v. *Council of the City of Emporia,* 407 U.S. 451

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* 426 U.S. at 229.

** 429 U.S. 252 (1977).

(1972), where, after a finding of intentional segregation and a federal court order to dismantle a dual system, the City of Emporia sought to withdraw from the school district. The withdrawal threatened to interfere with the plan for integration. This Court held the withdrawal impermissible solely because of its effect. Distinguishing *Emporia* in *Washington* v. *Davis,* this Court pointed out: "There was thus no need [in *Emporia*] to find 'an independent constitutional violation.' " "The constitutional predicate . . . was 'the enforcement until 1969 of racial segregation in a public school system of which Emporia had always been a part.' " 426 U.S. at 243, *citing Emporia,* 407 U.S. at 459.

The distinction is of consequence. Proof of intent is important for purposes of initial violation, at least in cases such as *Washington* v. *Davis,* where the social costs of condemning government action on the basis of disparate impact alone are high. But where the question is the sufficiency of relief to cure a proved violation, the requirement of demonstrating a new discriminatory intent is both irrelevant and redundant.*

This Court should grant the writ in order to clarify that a remedies case requires no further proof of intent but rather analysis of the fit between eradication of the violation and the means chosen therefor.

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* As this Court said in *Emporia,* rejecting the claim that plaintiff must prove illegal intent: "the mandate of *Brown II* [*Brown* v. *Board of Education,* 349 U.S. 294 (1955)] was to desegregate schools, and we have said that '[t]he measure of any desegregation plan is its effectiveness.' " 407 U.S. at 462, *citing Davis* v. *School Commissioners of Mobile County,* 402 U.S. 33, 37 (1971).

D. This Court Should Consider Whether School Board Action to Prevent "White Flight" and to Allay Whites' Distaste for Integration Demonstrates Intent to Discriminate.

If this Court concludes that intent to discriminate must first be established, then the record conclusively does so, or at a minimum creates an unrebutted presumption against the school board, because the Proposed Plan is racial in design, based upon race conscious criteria, for the purpose of reaching a discriminatory result.

The school board made two racially-based political judgments in deciding to adopt the Proposed Plan: first, the Board accepted the presumption that white students are more likely to remain in Norfolk public elementary schools if whites constitute a sizeable portion of the student body; second, that the cost of creating additional racially identifiable "black" elementary schools was outweighed by the benefit of inducing white students to remain in the public elementary school system. The result of the Proposed Plan would be a great increase in the racial identifiability of a substantial number of elementary schools. 784 F.2d at 527. All of these aspects of the genesis and adoption of the Proposed Plan fundamentally implicate race.

The courts below treated the *Riddick* case as one in which a race-neutral pupil assignment plan was challenged on the ground of discriminatory motivation. *Id.* at 540. This ignores the fact that the challenged plan is simply not race-neutral nor does it use race to cure discrimination. Its very conception arises from the dynamic that: (a) the Board wanted to keep white children in the schools; (b) so, it hired a consultant to conduct a survey of the attitudes of parents; (c) the consultant determined that white parents did not mind having their children in schools with blacks, so long as there are not *too many* blacks compared with

whites; (d) the Board then designed a plan whose essential purpose was to fix a racial balance in the schools which was acceptable to whites. *Id.* at 526-27. This kind of action to achieve a racially-defined result mocks the concept of Equal Protection, without regard to whether the motive for seeking that result is malign or benign.*

The purposive creation of majority white schools to avoid white flight is an inescapable slur on blacks—it "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to . . . race prejudice" (*Strauder* v. *West Virginia,* 100 U.S. 303, 308 (1879))—whether or not ill-intended. If—as *Brown* fundamentally recognized—"separate" cannot be "equal," neither can "proportion-controlled" be "equal" when the proportions are race-defined. The infidelity of the Fourth Circuit decision to *Brown* is indefensible.

The school board's action, grounded in racial distinctions, is inherently suspect and suspect distinctions must be subject to strict judicial scrutiny. *Wygant,* 54 U.S.L.W. at 4481 (where a state agency's action operates in favor of a certain racial group and against another, there arises a suspect classification based on race); *Regents of the University of California* v. *Bakke,* 438 U.S. at 290-91; *Loving* v. *Virginia,* 388 U.S. 1, 8-9 (1967). Strict scrutiny shifts the burden to the school board to establish a compelling

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* *See e.g. Anderson* v. *Martin,* 375 U.S. 399 (1964) (invalidating a Louisiana statute which required that the race of candidates be designated on all ballots in state elections); *Hunter* v. *Erickson,* 393 U.S. 385 (1969) (invalidating an amendment to the Akron, Ohio city charter which prevented the city council from implementing any anti-discrimination housing ordinances without the approval of a majority of the voters).

As Justice Powell stated in *Regents of the University of California* v. *Bakke,* "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." 438 U.S. at 307.

state interest justifying its racially conscious actions. *Bakke*, 438 U.S. at 290-91. If intent is to be an issue, the burden of proof should have fallen on the school board to establish a constitutionally permissible basis for its actions.

Under the strict scrutiny test the "means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" *Wygant*, 54 U.S.L.W. at 4481, *citing Fullilove* v. *Klutznick*, 448 U.S. 448, 480 (1980) (opinion of Burger, C.J.). As in *Wygant*, the Norfolk Board's stated purpose is to effect and maintain the desegregation of the school system. Just as this Court held in *Wygant* that the role model theory espoused by the Jackson Board had "no logical stopping point," "allow[ing] the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose" (Powell, J., for the plurality, 54 U.S.L.W. at 4482), the Norfolk Board's reliance on the white flight rationale is likewise limitless. The judicially rejected idea that black students are better served by black teachers is analogous to the idea that white students are more likely to remain in the public system if they constitute a sizeable portion of the student body. Both notions may be used to escape the obligation to remedy discriminatory practices.

From *Brown II*, 349 U.S. at 300, and *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958) through *Monroe* v. *Board of Commissioners of Jackson*, 391 U.S. 450, 459 (1968) and *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484, 491 & n.5 (1972), however, this Court has repeatedly rejected fears, predictions, or reports of white withdrawal from desegregating school districts as a justification for requiring anything less than the complete eradication of racially dual school systems through the implementation of plans designed to achieve "the greatest possible

degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *School Commissioners of Mobile*, 402 U.S. at 37.* There is no way to square the *Riddick* decisions below with these principles.

The notion that the Fourteenth Amendment would permit public officials to reassign minority students mandatorily to all-minority schools, in an effort to lure additional white students to enroll in *other* public schools, clashes violently with the constitutional principle underlying the *Brown* decision itself. As Judge Sobeloff eloquently put it, the constitutional requirement of desegregation "is not founded upon the concept that white children are a precious resource which should be fairly apportioned." *Brunson* v. *Board of Trustees*, 429 F.2d 820, 826 (4th Cir. 1970) (concurring opinion).

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* To distinguish, in the manner of the Fourth Circuit (784 F.2d at 539), this Court's decisions merely because they involved an earlier phase of desegregation, that of dismantling of dual school systems, is disingenuous where the Proposed Plan undermines "unitariness" and re-establishes a key aspect of the prior dual system.

Conclusion

For the foregoing reasons, the Lawyers' Committee for Civil Rights Under Law, the NAACP Special Contribution Fund, the American Civil Liberties Union and the Mexican American Legal Defense and Educational Fund, as *amici curiae*, respectfully pray that the petition for writ of certiorari be granted and the judgment below be reversed.

Dated: June 27, 1986

Respectfully submitted,

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IN THE

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PAUL R. RIDDICK, JR., *et al.*,

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THE SCHOOL BOARD OF THE CITY OF NORFOLK, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 85-1962

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAUL R. RIDDICK, JR. et al,

Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF NORFOLK, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

The petitioners Paul R. Riddick, Jr., et al., respectfully submit this supplemental brief pursuant to Rule 22.6 to call

attention to a decision which was not available at the time the petition for certiorari was filed.

STATEMENT

On June 26, 1986, the United States Court of Appeals for the Tenth Circuit filed an opinion in Dowell v. Board of Education of the Oklahoma City Public Schools, 10th Cir. No. 85-1886, not yet reported. A copy of that opinion is appended to this supplemental brief. See pp. 1a et seq., infra.

The Dowell case was filed in 1961 by black pupils and parents seeking the desegregation of the Oklahoma City public schools. After "extensive" litigation (5a, infra) and numerous appeals, including a decision by this Court (Dowell v. Board of Education, 396 U.S. 269 (1969)), the district court ordered implementation of the "Finger Plan"

prepared by the court's expert consultant in the 1972-73 school year. 5a, infra. The plan integrated middle schools and high schools by restructuring attendance zones. 6a, infra. Similarly, at the elementary level single attendance area "stand alone" schools were created to serve those neighborhoods which were integrated. 6a-7a, infra. Schools located in all-white areas were structured to educate pupils in grades 1-4, with black pupils being bused to these schools from black areas of the city. 6a, infra. The schools in all-black areas were designated as "fifth grade centers" and pupils from all-white areas were bused to integrate those schools. Id.

In 1977, after successful implementation of the plan for several years, the court terminated jurisdiction of the case,

without vacating or modifying the 1972 order requiring implementation of the Finger Plan. 7a, infra.

The current proceedings began in February 1985, when the school board unilaterally abandoned the Finger Plan and adopted a new plan called the Student Reassignment Plan. 8a, infra. This plan which was implemented during the 1985-86 school year, eliminated the busing of black students to white schools in grades 1-4 and reinstituted single attendance area schools in those grades. Id. The Tenth Circuit said that "As a result of this plan, thirty-three of the district's sixty-four elementary schools are attended by students who are ninety percent, or more, of one race." Id.

The Tenth Circuit noted that the Student Reassignment Plan did provide for a majority-to-minority transfer option

with free transportation to any child who is in a racial majority group at any school, and that the board continued busing to maintain integration in the fifth grade centers, as well as in middle and high schools. Id. [1]

---

[1] The Oklahoma City Plan thus includes the same features which the Norfolk Board emphasized in its Brief In Opposition to Certiorari to demonstrate that its proposed plan preserves some features of the court-ordered desegregation plan, namely a majority-to-minority transfer provision, and continued busing in the higher grade levels. See Brief in Opposition to Certiorari, p. 8-11, 26-27. The Norfolk Board's reference to these features and to their projected effect on "majority white schools" (Brief In Opposition, p. 9), as well as to the numbers of black teachers, administrators and school board members in Norfolk (Brief In Opposition, p. 4) merely seeks to distract attention from the gravamen of petitioners' complaint, which is that the new Norfolk Plan will restore to all-black status 10 elementary schools (containing almost 40% of Norfolk's black elementary students) which were segregated by law prior to the now-dismantled court-ordered plan and are therefore historically identified as de jure black schools.

Similarly the Brief in Opposition

The Tenth Circuit reversed the district court decision and held that the district court erred in denying plaintiffs' motion to reopen the case and in deciding the constitutional validity of the board's plan without giving plaintiffs ample opportunity to develop the substantive issues in the case. 4a, 34a, infra. The Court also held that the district court erred in requiring plaintiffs to

---

distracts attention from the undisputed fact that a large majority of Norfolk's black citizens have opposed the new plan and supported continuation of the busing plan. See 4th Cir. App. at 823, 2149. Norfolk's school board members, including those black board members who have at times supported the proposed plan, are all appointed by Norfolk's white-majority City Council. 4th Cir. App. 255. The white political domination of Norfolk's City Council under an at-large election system is the subject of a recent voting rights case in this Court. See Collins v. City of Norfolk, 768 F.2d 572 (4th Cir. 1985), vacated and remanded July 7, 1986, No. 85-1300.

prove that the school board's new plan was adopted with discriminatory intent and violated the Constitution. 11a, 34a, infra. The case was remanded for further evidentiary proceedings to determine whether the original mandatory order should be enforced and whether and how it should be modified.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE FOURTH CIRCUIT IN RIDDICK IS IN CONFLICT WITH THE DECISION OF THE TENTH CIRCUIT IN DOWELL

The petition for certiorari should be granted under Rule 17.1(a) because the Fourth and Tenth Circuits are now squarely in conflict, not only with regard to the legal rules to be applied in these two factually indistinguishable cases, but

also on at least four issues of general applicability and critical importance in school desegregation litigation.

1. The Tenth Circuit holds that an order dismissing a school desegregation case upon a finding that the school district has achieved unitary status does not have the effect of terminating the responsibilities of the defendants to continue to comply with a permanent injunction previously entered in the case and not vacated by the final order. 12a-20a, infra. The Fourth Circuit holds to the contrary in Riddick. Pet. App. 29A-40A; Riddick v. School Board of City of Norfolk, 784 F.2d 521, 529-532 (4th Cir. 1986).

2. The Tenth Circuit holds that "the purpose of a court-ordered school integration plan is not only to achieve, but also to maintain, a unitary school

system." 18a, infra. (emphasis in original). The Fourth Circuit holds to the contrary. Pet. App. 56A, 73A-75A; Riddick, supra, 784 F.2d at 535, 539.

3. The Tenth Circuit recognizes a distinction between (a) the right of black school children to challenge school board action which undoes a feature of the very desegregation plan that produced a unitary system and (b) their "attempts to achieve further desegregation based upon minor demographic changes not 'chargeable' to the board" (27a, infra) such as were involved in "the Spangler line of cases" (27a, infra). 25a-30a. The Fourth Circuit rejects this distinction and finds the reasoning of the Ninth Circuit in Spangler controlling even where the challenged action of the school board undoes a key feature of the court-ordered

desegregation plan that made it work. Pet. App. 58A-74A; Riddick, supra, 784 F.2d at 536-539.

4. The Tenth Circuit finds that where the challenged action is of this sort, "it is not necessary for the party seeking [relief against changes of the court-ordered plan] ... to prove the changes were motivated by discriminatory intent." 11a; see also 33a-34a, infra. The Fourth Circuit holds to the contrary. Pet. App. 64A-65A; 72A, 75A-97A; Riddick supra, 784 F.2d at 537, 538, 539-544.

The Tenth Circuit was aware of the Riddick decision and expressly stated in Dowell that "The Fourth Circuit has taken a different view with which we cannot agree." 17a, n.3, infra. The plain conflict of circuits on the important

issues presented is an additional reason that the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NO. 85-1886

Filed June 26, 1986
ROBERT L. HOECKER
Clerk

==========

ROBERT L. DOWELL, an infant under the age of 14 years, who sues by A.L. Dowell, his father as next friend,

Plaintiff-Appellant,

VIVIAL C. DOWELL, a minor, by her father, A.L. DOWELL, as next friend, et al.,

Intervening Plaintiffs-Appellants,

STEPHEN S. SANGER, JR., on behalf of himself and all others similarly situated, et al.,

Intervening Plaintiffs, and

YVONNE MONET ELLIOT and DONNOIL S. ELLIOT, both minor

children, by and through their parent and guardian, DONALD R. ELLIOT, et al.,

Applicants in Intervention-Appellants,

vs.

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, a Public Body Corporate, et al.,

Defendants-Appellees.

Appeal From the United States District Court for the Western District of Oklahoma
(D.C. No. CIV-9452)

Theodore A. Shaw (Julius LeVonne Chambers and Napoleon B. Williams, Jr., with him on the briefs), New York, New York; John W. Walker, Little Rock, Arkansas; and Lewis Barber, Jr., of Barber/Traviolia, Oklahoma City, Oklahoma; for Plaintiffs and Applicants in Intervention-Appellants.

Ronald L. Day of Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, Oklahoma, for The Board of Education of the Oklahoma City Public Schools, Independent District No. 89, Oklahoma, County, Oklahoma, Defendant-Appellee.

William Bradford Reynolds, Assistant Attorney General, Walter W. Barnett, Mark L. Gross, and Michael Carvin, Attorneys, Department of Justice, Washington, D.C., filed an Amicus Curiae brief for the United States of America.

Before MOORE and ANDERSON, Circuit Judges, and JOHNSON, District Judge.*

MOORE, Circuit Judge.

This appeal is the latest chapter in the odyssey of the desegregation of the public school system in Oklahoma City, Oklahoma. After many years of litigation, in 1977 the trial court found that the school district had achieved unitariness and entered an order terminating the court's active supervision of the case. The parties are now before this court af-

*Honorable Alan Johnson, United States District Judge for the District of Wyoming, sitting by designation.

ter an unsuccessful attempt to enjoin the school district from altering the attendance plan previously mandated by the district court. The district court, in part relying on its 1977 termination order, not only denied the petitioners' motion to reopen the case, but also decided the issue of the constitutionality of the new attendance plan. Dowell v. School Board of Oklahoma City Public Schools, 606 F. Supp. 1548 (E.D. Okla. 1985). In this appeal, we address only the precise question of whether the trial court erred in denying the motion to reopen. We hold, under the facts present here, that the court erred and remand for additional factual determinations.

BEST AVA

I.

This case was filed in 1961, and the history of the litigation is extensive.[1] In the ensuing years, the parties struggled through the difficult task of desegregating the public schools, each proffering plans to accomplish that goal. Finally, after finding the district had "emasculate[d]" a previously approved plan, the district court ordered the implementation of the so-called "Finger Plan." Dowell v. School Board of Oklahoma City Public Schools, 338 F. Supp. 1256, 1263 (W.D. Okla.), aff'd, 465 F.2d 1012 (10th Cir.), cert. denied, 409 U.S. 1041

[1] See Dowell v. School Board of Oklahoma City Public Schools, 219 F. Supp. 427 (W.D. Okla. 1963); Dowell v. School Board of Oklahoma City Public Schools, 430 F.2d 865 (10th Cir. 1970); Dowell v. School Board of Oklahoma City Public Schools, 338 F. Supp. 1256 (W.D. Okla.), aff'd, 465 F.2d 1012 (10th Cir.), cert. denied, 409 U.S. 1041 (1972).

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(1972). That plan, which was instituted during the 1972-1973 school year, restructured attendance zones for high schools and middle schools so that each level enrolled black and white students. At the elementary level, all schools with a majority of black pupils became fifth grade centers which provided enhanced curricula. All elementary schools with a majority of white students were converted to serve grades one through four. Generally, the white students continued to attend neighborhood schools while black students in grades one through four were bused to classes. When white students reached the fifth grade, they were bused to the fifth grade centers, while black fifth graders attended the centers in their neighborhoods. Schools which were located in integrated areas qualified

as "stand alone schools," and the students in grades one through five remained in their own neighborhoods.

In June 1975, the school board moved to close the case on the ground that it had "eliminated all vestiges of State-imposed racial discrimination in its school system, and [that it was] ... operating a unitary school system." Although the motion was contested, the court terminated active supervision of the case because it found the Finger Plan had achieved its objective. Dowell v. School Board of Oklahoma City Public Schools, No. CIV-9452, slip op. (W.D. Okla. Jan. 18, 1977). See Dowell, 606 F. Supp. at 1551 (quoting the unpublished order in part). The order was not appealed. The 1977 order did not vacate or modify the 1972 order mandating implementation of the Finger Plan.

In February 1985, the plaintiffs sought to reopen the case, claiming the school board unilaterally abandoned the Finger Plan and instituted a new plan for school attendance. The Student Reassignment Plan, which has already been implemented, eliminates compulsory busing of black students in grades one through four and reinstitutes neighborhood elementary schools for these grades. Free transportation is provided to children in the racial majority in any school who choose to transfer to a school in which they will be in the minority. The racial balance of fifth grade centers, middle schools, and high schools is maintained through mandatory busing. As a result of this plan, thirty-three of the district's sixty-four elementary schools are attended by students who are ninety percent, or more, of one race.

The district court denied the motion to reopen.[2] The court held that the Student Reassignment Plan was not constitutionally infirm and, therefore, no "special circumstances" were present that would justify reopening the case. Dowell, 606 F. Supp. at 1557. The court concluded as a matter of law: (1) The principles of res judicata and collateral

---

[2] Plaintiffs contend that the district court erred in not specifically granting their motion to intervene. Nevertheless, the court held those who sought intervention were within the ambit of the original plaintiff class, and those persons, through their counsel, actively participated in the hearing to reopen. They were clearly treated as party litigants even though a formal order granting them intervention was not entered. Indeed, at the outset of the hearing, the court stated that the parties "did meet the requirement to be a plaintiff." As a practical matter, the appealing parties were allowed to intervene despite the order denying all relief prayed for; therefore, within the peculiar context of this case, we conclude the issue is moot and the appealing persons are proper parties.

estoppel prohibit the plaintiffs from challenging the court's 1977 finding that the school system was unitary. (2) The 1985 school district displays all indicia of unitariness. (3) Neighborhood schools, when impartially maintained and administered, are not unconstitutional. Moreover, the existence of racially identifiable schools, without a showing of discriminatory intent, is not unconstitutional. (4) The Student Reassignment Plan is not discriminatory and was not established with discriminatory intent.

On appeal, the plaintiffs contend the trial court erred in arriving at these conclusions without reopening the case and without giving them an adequate opportunity to present evidence on the substantive issues. We agree and hold that, while the principles of res judicata may apply in school desegre-

gation cases, a past finding of unitariness, by itself, does not bar renewed litigation upon a mandatory injunction. Moreover, when it is alleged that significant changes have been made in a court-ordered school attendance plan, any party for whose benefit the plan was adopted has a right to be heard on the issue of whether the changes will affect the unitariness of the system. In such circumstances, it is not necessary for the party seeking enforcement of the injunction to prove the changes were motivated by a discriminatory intent. Accordingly, we conclude the trial court erred in not reopening the case.

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II.

A.

Any analysis of the legal principles governing this case must start with the procedural framework in which it was postured when the plaintiffs sought to reopen. When the defendant board adopted the Student Reassignment Plan, the 1972 order approving the Finger Plan and ordering its immediate implementation still governed the parties. That order was in the nature of a mandatory injunction, and the effect of that order was not altered by the 1977 order terminating the court's active supervision of the case.

Perhaps the members of the present school board acted upon the belief that the 1972 order was no longer effec-

tive; if so, their belief was unwarranted. Indeed, the 1972 order specifically provided:

> The Defendant School Board and the individual members thereof, both present and future, together with the Superintendent of Schools, shall implement and place [the Finger Plan] into effect . . . .
>
> The Defendant School Board shall not alter or deviate from the [Finger Plan] . . . without the prior approval and permission of the court. If the Defendant is uncertain concerning the meaning or intent of the plan, it should apply to the court for interpretation and clarification.

Dowell, 338 F. Supp. at 1273 (emphasis added).

Nothing in the 1977 order tempered the 1972 mandatory injunction. In fact, the 1977 order states:

> The Court has concluded that ... [the Finger Plan] was indeed a Plan that worked and that substantial compliance with the constitutional requirements has been achieved. The

> School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before the Court.
>
> ... The Court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements.

Dowell, No. CIV-9452, slip op. at 1 (W.D. Okla. Jan. 18, 1977) (emphasis added).

In light of these statements reinforcing the importance of the remedial injunction and the lack of any specific or implied alteration of that remedy, we must conclude the court intended the 1972 order to retain its vitality and prospective effect. Therefore, the com-

peting interests of both parties must be assessed first within the penumbra of the outstanding 1972 order. To do otherwise renders all of what has occurred since 1961 moot and mocks the painful accomplishments of sixteen years of litigation and active court supervision.

As amicus, the government argues that once a finding of unitariness is entered, all authority over the affairs of a school district is returned to its governing board, and all prior court orders, including any remedial busing order, are terminated. According to the government, the defendants could not be compelled to follow the Finger Plan once the court determined the district was unitary. We find the contention without merit. The parties cannot be thrust back to the proverbial first square just

because the court previously ceased active supervision over the operation of the Finger Plan.

While there are sound reasons for courts to seek the earliest opportunity to return control of school district affairs to the local body elected for that purpose, those reasons do not require abandonment of the inherent equitable power of any court to enforce orders which it has never vacated. The court's authority is not diminished once the original case has been closed because the viability of a permanent injunction does not depend upon this ministerial procedure. See Ridley v. Phillips Petroleum Co., 427 F.2d 19 (10th Cir. 1970). Therefore, termination of active supervision of a case does not prevent the court from enforcing its orders. If such were the case, it would give more

credence to the ministerial function of "closing" a case and less credence to the prospective operation of a mandatory injunction.[3] See Berman v. Denver Tramway Corp., 197 F.2d 946 (10th Cir. 1952).

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[3] The Fourth Circuit has taken a different view with which we cannot agree. In Riddick v. The School Board of the City of Norfolk, No. 84-1815, slip op. (4th Cir. 1986), the court seems to treat a district court order terminating supervision as an order dissolving a mandated integration plan, despite the absence of a specific order to that effect. The court makes a bridge between a finding of unitariness and voluntary compliance with an injunction. We find no foundation for that bridge. It also appears inconsistent with Lee v. Macon County Board of Education, 584 F.2d 78 (5th Cir. 1978), in which the court held that a finding by the district court that the school system was "unitary in nature" did not divest the court of subject matter jurisdiction of a petition to amend the desegregation plan where the court had not dismissed the case. A finding of unitariness may lead to many other reasonable conclusions, but it cannot divest a court of its jurisdiction, nor can it convert a mandatory injunction into voluntary compliance.

The government's position ignores the fact that the purpose of court-ordered school integration is not only to achieve, but also to maintain, a unitary school system. Keyes v. School District No. 1, Denver, Colo., 609 F. Supp. 1491, 1515 (D. Colo. 1985).[4] When the district court terminated active supervision over this case, it acknowledged that the original purpose of the lawsuit had been achieved and that the parties had implemented a means for maintaining that goal.

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[4] See also Lee v. Macon County Board of Education. 584 F.2d 78, 81 (5th Cir. 1978) (after full responsibility for educational decisions has been returned to public school officials by the court, they "are bound to take no actions which would reinstitute a dual school system"); Graves v. Walton County Board of Education, 686 F.2d 1135 (11th Cir. 1982), aff'g in part, rev'g in part, 91 F.R.D. 457 (M.D. Ga. 1981) (despite an earlier finding that desegregation had been accomplished, the courts reject a modification of the 1968 desegregation plan which would effectively resegregate the system).

Dowell, 606 F. Supp. at 1551 (1977 termination order). However, without specifically dissolving its decree, the court neither abrogated its power to enforce the mandatory order nor forgave the defendants their duty to persist in the elimination of the vestiges of segregation.

We therefore see no reason why this case should be treated differently from any other case in which the beneficiary of a mandatory injunction seeks enforcement of the relief previously accorded by the court. See Swann, 402 U.S. at 15-16. When a federal court has restored unsupervised governance to a board of education, the board must, like any other litigant, return to the court if it wants to alter the duties imposed upon it by a mandatory decree. Vaughns v. Board of Education of Prince George's

County, 758 F.2d 983 (4th Cir. 1985). See also Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976). It is only when the order terminating active supervision also dissolves the mandatory injunction that the governing board regains total independence from the previous injunction.

B.

The record in this case indicates that the defendants, unilaterally and contrary to the specific provisions of the 1972 order, have taken steps to avoid the duties imposed upon them by a continuing decree. By implementing the Student Reassignment Plan, the defendants have acted in a manner not contemplated by the court in its earlier decrees. The plaintiffs now are simply attempting to

reassert the validity of the 1972 order and to perpetuate the duties placed upon the district.

When a party has prevailed in a cause for mandatory injunction, that party has a right to expect that prospective relief will be maintained unless the injunction is vacated or modified by the court. See W.R. Grace and Co. v. Local Union 759, International Union of United Rubber Workers of America, 461 U.S. 757 (1983). See also GTE Sylvania, Inc. v. Consumers Union of United States, 445 U.S. 375 (1980). To make the remedy meaningful, the injunctive order must survive beyond the procedural life of the litigation and remain within the continuing jurisdiction of the issuing court. E.E.O.C. v. Safeway Stores, Inc., 611 F.2d 795 (10th Cir. 1979), cert. denied, 446 U.S. 952

(1980); 11 Wright & Miller, Federal Practice and Procedure § 2961 (1973). This binding nature of a mandatory injunction is recognized in school desegregation cases. Pasadena City Board of Education v. Spangler, 427 U.S. 424, 439 (1976).

Thus, the beneficiary of a mandatory order has the right to return to court to ask for enforcement of the rights the party obtained in the prior litigation. To invoke the court's authority, the party seeking enforcement must establish that the injunctive decree is not being obeyed. Northside Realty Associates, Inc. v. United States, 605 F.2d 1348 (5th Cir. 1979).

C.

Although prospective orders must be obeyed, federal courts are also empowered to alter mandatory orders

when equity so requires. United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968); System Federation No. 91, Railway Employee's Department v. Wright, 364 U.S. 642 (1961); United States v. Swift & Co., 286 U.S. 106 (1932). We have previously adopted the rationale behind these cases in establishing guidelines "applicable in all instances where . . . the relief sought is escape from the impact of an injunction." Securities and Exchange Commission v. Jan-dal Oil & Gas, Inc., 433 F.2d 304, 305 (10th Cir. 1970).

Given the mandatory nature and prospective effect of an injunctive order, changes in injunctions must not be lightly countenanced but must be based upon a "substantial change in law or facts." Securities and Exchange Commission v. Thermodynamics, Inc., 464 F.2d

457, 460 (10th Cir. 1972), cert. denied, 410 U.S. 927 (1973). A change in attitude by the party subjected to the decree is not enough of a change in circumstances to warrant withdrawing the injunction. Id. Therefore, when a party establishes that another has disregarded a mandatory decree or has taken action which has resulted in a deprivation of the benefits of injunctive relief, the court cannot lightly treat the claim. Having once determined the necessity to impose a remedy, the court should not allow any modification of that remedy unless the law or the underlying facts have so changed that the dangers prevented by the injunction "have become attenuated to a shadow," Jan-dal, 433 F.2d at 305, and the changed circumstances have produced "'hardship so extreme and unexpected' as to make the decree oppressive." Safe-

way, 611 F.2d at 800 (quoting Swift & Co.). See also United States v. United Shoe Machinery Corp., 391 U.S. at 251-52. Indeed, this "difficult and . . . severe requirement" is necessary to be consistent with res judicata principles. Themodynamics, 464 F.2d at 460.

D.

The court's 1972 order requiring implementation of the Finger Plan was binding upon both sides. More pointedly, the order specified that the defendants were not to "alter or deviate from the [Finger Plan] . . . without the prior approval and permission of the court." Dowell, 338 F. Supp. at 1273. While defendants unilaterally could not take action contrary to the plan, plaintiffs also could not expect more than the approved plan provided. When, five years later, the court determined that the

implementation of the Finger Plan had resulted in unitariness within the district, that finding became final, and it, too, is binding upon the parties with equal force. Yet, that historical finding does not preclude the plaintiffs from asserting that a continuing mandatory order is not being obeyed and that the consequences of the disobedience have destroyed the unitariness previously achieved by the district.

Thus, while the trial court properly refused to permit the plaintiffs to relitigate conditions extant in 1977, it erred in curtailing the presentation of evidence of changes that have since occurred. Consequently, plaintiffs were deprived of the opportunity to support their petition for enforcement of the court's prior order.

In reaching this conclusion, we are not traveling new trails. We contrast this case with the Spangler line of cases[5] in which an aggrieved party sought remedial relief in addition to the previous decree. Here, the plaintiffs do not seek the continuous intervention of the federal court decried by the Supreme Court. We are not faced with an attempt to achieve further desegregation based upon minor demographic changes not "chargeable" to the board. Spangler, 427 U.S. at 435. Rather, here the allegation is that the defendants have intentionally abandoned a plan which achieved unitariness and substituted one which

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[5] Spangler v. Pasadena City Board of Education, 375 F. Supp. 1304 (C.D. Cal. 1974), aff'd 519 F.2d 430 (9th Cir. 1975), vacated, 427 U.S. 424 (1976), on remand, 549 F.2d 733 (9th Cir. 1977).

appears to have the same segregative effect as the attendance plan which generated the original lawsuit.

Given the sensitive nature of school desegregation litigation and the peculiar matrix in which such cases exist, we are cognizant that minor shifts in demographics or minor changes in other circumstances which are not the result of an intentional and racially motivated scheme to avoid the consequences of a mandatory injunction cannot be the basis of judicial action. See Spangler, 427 U.S. at 434-35; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). However, when it is asserted that a school board under the duty imposed by a mandatory order has adopted a new attendance plan that is significantly different from the plan approved by the court and when the results of the

adoption of that new plan indicate a resurgence of segregation, the court is duty bound either to enforce its order or inquire whether a change of conditions consistent with the test posed in Jan-dal has occurred.

Therefore, consistent with traditional concepts of injunctive remedies in federal courts, plaintiffs have the right to a full determination of whether and to what extent their previously decreed rights have been jeopardized by the defendants' actions subsequent to the entry of the mandatory decree. Moreover, we hold the plaintiffs' assertion that the defendants abandoned the Finger Plan without court approval constitutes the "special circumstances" the trial court found absent from the case. The existence of these circumstances should have been recognized by the trial court as a basis

for relief under Fed. R. Civ. P. 60(b), and the court's failure to do so results in manifest abuse of discretion which requires reversal. See Security Mutual Casualty Co. v. Century Casualty Co., 621 F.2d 1062 (10th Cir. 1980).

III.

Having concluded the district court erred in not granting plaintiffs' motion to reopen, we must decide whether the error is significant in light of the court's factual findings on the board's new plan. After review of the evidence, which led the district court to hold the new plan was not constitutionally infirm, we conclude that reversal will not be futile.

The record indicates that the hearing from which the court's findings were drawn was called for a narrow purpose. The order setting the hearing provided:

> [T]he motion to intervene and reopen and the defendants' response join the issues, and the matters in them are set for evidentiary hearing ... at which time the question of whether this case shall be reopened and the applicants allowed to intervene shall be tried and disposed of.

(Emphasis added.) From the outset, then, the only issues the parties were notified to present to the court dealt with reopening and intervention. The court did not indicate that it intended to hear evidence upon or determine the substantive constitutional issues relating to the plan or its effects.

Plaintiffs now argue they were unprepared to be heard on the ultimate issues. Indeed, on two occasions

plaintiffs' counsel inquired whether the only issue to be heard was that of reopening, and the court replied affirmatively. Hence, plaintiffs argue their understanding of the limited scope of the hearing curtailed their cross-examination of the defendants' witnesses and prevented them from introducing evidence of alternative plans. Our review of the record supports this assertion. While evidence bearing on the substantive issue was presented, it focused on the underlying reasons for reopening the case rather than on the ultimate constitutional issue.

In reaching the substantive issues, the district court also improperly recast the burden of proof. As we have already noted, the plaintiffs, as the beneficiaries of the original injunction, only have the burden of showing

the court's mandatory order has been violated. Northside Realty Associates, Inc. v. United States, 605 F.2d 1348 (5th Cir. 1979). The defendants, who essentially claim that the injunction should be amended to accommodate neighborhood elementary schools, must present evidence that changed conditions require modification or that the facts or law no longer require the enforcement of the order. See E.E.O.C. v. Safeway Stores, Inc., 611 F.2d 795 (10th Cir. 1979), cert. denied, 446 U.S. 952 (1980).

Thus, by placing the burden on the plaintiffs to show the school district was no longer unitary, the court changed the usual course of what in reality is a petition for a contempt citation. The plaintiffs were required not only to prove the mandatory injunction had been violated, but also that the violation

contravened the constitution. In the framework of this case, the latter element was beyond the scope of the hearing and certainly never the plaintiffs' burden.

Accordingly, we believe the trial court reached the merits prematurely. We applaud the court's effort to bring speedy resolution to a difficult issue, but fairness and our understanding of the procedures governing federal injunctive remedies require us to conclude the court did not give the moving parties ample opportunity to develop the substantive issues.

We have confined our analysis to the narrow issue of the plaintiffs' right to reopen; therefore, our holding should not be construed as addressing, even implicitly, the ultimate issue of the constitutionality of the defendants' new

school attendance plan. The judgment of the trial court is reversed, and the case is remanded for further proceedings to determine whether the original mandatory order will be enforced or whether and to what extent it should be modified.

DOCKET NO. 85-1962

Supreme Court, U.S.
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SEP 2 1986
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CLERK

IN THE

Supreme Court of the United States

October Term, 1985

PAUL R. RIDDICK, JR., et al.,

Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF NORFOLK, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF

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DOCKET NO. 85-1962

IN THE

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PAUL R. RIDDICK, JR., et al.,

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v.

THE SCHOOL BOARD OF THE
CITY OF NORFOLK, et al.,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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RESPONDENTS' SUPPLEMENTAL BRIEF

Respondents submit this Supplemental Brief pursuant to Rule 22.6 and to comment on Petitioners' Supplemental Brief citing Dowell v. Bd. of Education

of Oklahoma City Public Schools, (10th Cir. No. 85-1886), decided on June 26, 1986 and not yet reported, but printed in the Appendix of Petitioners' Supplemental Brief and cited as creating a conflict between the Tenth and Fourth Circuits.

A comparison of the Dowell decision with the subject case of Riddick v. School Board of the City of Norfolk, Petitioners' Appendix, P 1a - 98a (hereinafter App.), 784 F.2d 521 (4th Cir. 1986), shows that they are not "squarely in conflict" in all of the areas contended by Petitioners.

Riddick was fully litigated on the merits in a three week trial with every issue raised by the Plaintiffs-Petitioners in contesting the constitutional aspects of the Norfolk School Board Plan and in urging the Court to

continue the 1971 "busing order" being addressed and decided by the trial and the appellate courts.

In contrast, the Dowell court in remanding to the trial court for additional factual determinations specifically stated that it addressed only the precise question of whether the trial court erred in denying plaintiffs' motion to reopen and confined its analysis to this narrow issue and its ". . . holding should not be construed as addressing, even implicitly, the ultimate issue of the constitutionality of the defendant's new school attendance plans . . .". Petitioners' Supplemental Appendix P. 4a and 34a (hereafter Supp. App.). The thrust of Dowell is that the trial court erred in holding a brief hearing supposedly only on plaintiff's right to reopen and challenge the

Oklahoma plan, but then deciding the merits of the plan itself without giving plaintiffs an opportunity to present evidence on the substantive issues (Supp. App. 9a, 10a, 26a, 31a, 32a).

Petitioners contend that there are four issues of critical importance in which the Fourth Circuit and Tenth Circuit are "squarely in conflict" (Supp. Brief P. 8 - 10).

As item one at page 8 of their brief, Petitioners contend that the Tenth Circuit has held that unitary status does not have the effect of terminating the responsibilities of the defendant to comply with the permanent injunction previously entered and not vacated by final order, and that the Fourth Circuit has held to the contrary. In assessing the accuracy of this contention, the trial court orders must be

looked to. While the "busing order" in Dowell might be construed as imposing a continuing obligation until a contrary order is entered, the terms of the Dowell order do not control the disposition of Riddick. The Dowell order specifically provided that "both present and future" Boards shall implement the Finger Plan and "shall not alter or deviate" from it "without the prior approval and permission of the court". In Riddick, the "busing order" in the predecessor Beckett/Brewer case simply ordered "that the plan of the School Board of the City of Norfolk, as amended, for the operation of the school for the system of the City of Norfolk for the year 1971 - 1972 is hereby approved". (Respondents' Appendix, p. 1.)1/

1/ By stipulation filed with the Riddick trial court it was agreed

Footnote Continued on Next Page

The Tenth Circuit viewed the decision of the Fourth Circuit as treating a unitary order "as dissolving a mandated integration plan despite the absence of a specific order to that effect" (Supp. App. 17a). This is an extreme and unwarranted view. Neither court in Riddick held, or even implied, that the unitary order was a dissolution or a dismantling of an integration plan. There is certainly a difference between such an extreme interpretation and the actual finding in Riddick in accord with the pronouncements of this Court in Swann v. Charlotte Mechlenburg Bd. of

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Footnote Cont'd.

> that any orders, exhibits, transcripts or proceedings from the Beckett record could be offered into evidence without further proof, subject to rulings on admissibility. This order was not offered or printed in the record as no issue had been raised as to it.

Ed., 402 U.S. 1 (1971) and other cases that it is desirable that the operation of the school systems be returned to the school boards from the courts upon the systems becoming unitary.

The Riddick court specifically did consider whether the 1971 "busing order" should be continued in effect as contended by Petitioners and upon the evidence presented found that there was no constitutional requirement to do so. The Dowell court has simply ordered that the trial court on remand also consider whether, on the merits, the previous "busing order" should be continued in effect or the new proposed plan followed.

The "bridge" between the unitary order and voluntary compliance as characterized by Dowell (Supp. App. 17a) does not mean that a school board may

choose not to comply with the constitution, as the Riddick court made it clear that there must be such compliance.

Page 10 of the Supplemental Brief as the Petitioners' conflict item four states that the Dowell court held that it was not necessary for the plaintiffs to show that any changes in the busing plan were motivated by discriminatory intent and that the Fourth Circuit in Riddick ruled to the contrary. The Dowell court emphasized the injunctive nature of its "busing order", so as noted above, the question of the type of order and how that reflected the intention of the court must be considered, demonstrating the procedural decision that Dowell represents as opposed to the decision on the merits that Riddick represents. The crux of the matter is

whether a change in a school plan results in it being unconstitutional and the unitary status affected, i.e. whether discriminatory and, in turn, whether there was discriminatory intent. Until the merits are fully addressed and a determination made as to the constitutionality of the Oklahoma City plan (and the present Dowell opinion specifically notes that it did not even implicitly attempt to address this issue) then the effect, if any, of this seeming conflict cannot be fully assessed. It is respectfully submitted that the perceived conflict at least in the present posture of the cases is not such as to warrant the granting of certiorari.

Of the other two contentions of Petitioners, they say as conflict item two on page 8 of the Supplemental Brief, that the Tenth Circuit holds that the

purpose of a court ordered school integration plan is not only to achieve, but also to maintain a unitary school system, but that The Fourth Circuit held to the contrary in Riddick. This statement is not accurate. Riddick held that, as a result of unitary status, the school boards and not the federal courts will run the schools, but the decision made it very clear that a non-discriminatory desegregated system had to be maintained by the school board subsequent to any unitary order, and that the continuing unitary status subsequent to the unitary order could be questioned at any time by persons affected. The whole thrust of the Riddick case was whether the school system had remained unitary subsequent to the unitary order in 1975, was unitary at the time of trial in 1984 and would

remain unitary after implementation of the proposed plan.

Petitioners next say as conflict item three on page 9 of the Supplemental Brief that the Tenth Circuit recognizes the right of school children to challenge school board action which undoes a feature of the very desegregation plan that produced a unitary system, but that the Fourth Circuit rejected this. This also is inaccurate. The very heart of plaintiffs' claim in Riddick was that the court should enjoin respondents from making any change in the 1971 "busing order" and this claim was fully addressed by both courts. The Fourth Circuit did not misread or misapply Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) as contended by Petitioners in citing Dowell, but the findings in Riddick were

consistent and in accord with the reasoning of Spangler and the other cases, including Swann, decided by this Court on the subject.

Both Dowell and Riddick hold that the principle of res judicata and collateral estoppel prevented a challenge to or relitigation of the initial finding of unitary status, but this did not bar subsequent litigation challenging the unitary status because of any change in conditions or actions. They are also consistent in holding that parties who may be affected by any change which will or may affect a unitary status has the right to be heard. The difference is that in Riddick the plaintiffs were heard, but in Dowell they were not heard.

In the posture in which it stands before the Court, Riddick presents

constitutional issues. The Petition for Certiorari presents no question and makes no argument concerning the effects of mandatory injunctions. It argues constitutional issues in constituional terms with citation of school desegregation cases decided under the Fourteenth Amendment by this Court. Petitioners arguments below attacked the constitutionality of the Proposed Plan and the courts below decided this case on constitutional issues.

By contrast, the Tenth Circuit's decision does not reach these constitiutional issues. Dowell turns solely on the impact of a previous injunction decree and the petitioners' right to reopen. The Dowell court cites school desegregation cases by way of background, but the substance of its analysis employs case authorities

dealing with injunctions and not with the equal protection clause.

Thus, the only conflict between Riddick and Dowell is in the results at a procedural stage. No legal conflict is presented, since the theories under which the appeals were decided were totally different, Riddick turning on the Consititution and Dowell turning on equity procedure.

In summary, Dowell addressed only the narrow issue as to whether plaintiffs had a right to reopen and did not consider the constitutionality of the revised plan, but ordered a remand of the case for such consideration. Therefore, in its present procedural posture, Dowell is not a decision which creates a conflict of the circuits warranting the granting of a Writ of Certiorari. The Riddick trial court did hear evidence,

did consider the constitutional issue and did consider the effect on the unitary status as the Dowell trial court has now been instructed to do. Having considered and addressed each constitutional issue, the Riddick court found that there was no constitutional violation.

For the reasons set forth herein and in Respondents' Brief In Opposition To Petition For Certiorari, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

THE SCHOOL BOARD OF THE CITY OF NORFOLK, et al.

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CERTIFICATE

I hereby certify that on this 2nd day of September, 1986, three copies of the foregoing were mailed, postage prepaid, to:

Julius LeVonne Chambers, Esq.
99 Hudson Street
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New York, New York 10013

All parties required to be served have been served.

Jack E. Greer

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

LEOLA PEARL BECKETT, ET AL.,

Plaintiffs,

v.

CIVIL ACTION

NO. 2214

THE SCHOOL BOARD OF
THE CITY OF NORFOLK, ET AL.,

Defendants.

O R D E R

This day came on again to be heard upon the Plan of the School Board of the City of Norfolk for the operation of the school system in the City of Norfolk for the year 1971-1972, and the objections thereto of the plaintiffs and the plaintiff-intervenor, United States of America, and upon objections filed thereto by the defendants-intervenors; upon the evidence produced and heard at

the hearings with regard thereto; upon the balance of the entire record in this case, including all prior proceedings and all Orders, Memoranda Opinions, reports, exhibits and papers filed; and upon arguments of counsel.

Upon consideration whereof and for the reasons set forth in the Memorandum Opinion of this Court filed July 28, 1971, which shall be considered as Findings of Fact and Conclusions of Law for the purpose of Rule 52 of the Federal Rules of Civil Procedure, it is

ADJUDGED, ORDERED and DECREEED

(1) That the Plan of the School Board of the City of Norfolk, as amended, for the operation for the school system of the City of Norfolk for the year 1971-1972 is hereby APPROVED.

(2) That the objections thereto of the plaintiffs,

plaintiff-intervenors, and defendants-intervenors, are DENIED.

(3) That the plaintiffs' motion for counsel fees to be taxed as cost is DENIED.

(4) That this cause shall be continued on the docket of this court.

(signed) John A. MacKenzie

United States District Judge

Norfolk, Virginia

July 28, 1971